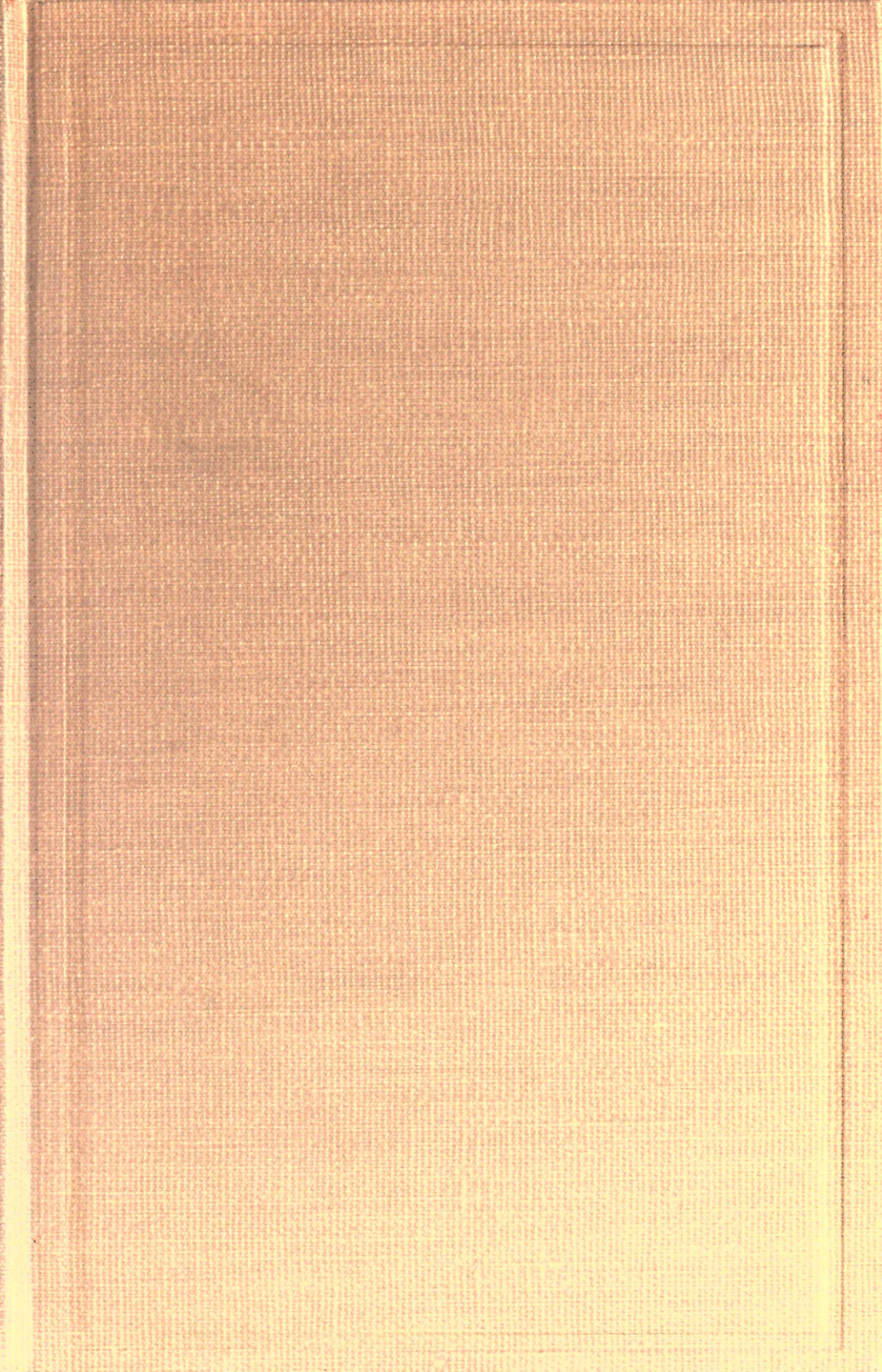






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FOREWORD PAGE

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CIVIL AND CRIMINAL
IN THE
UNITED STATES CIRCUIT COURT
OF
THE DISTRICT OF COLUMBIA,
FROM 1801 TO 1841,
IN SIX VOLUMES.
BY WILLIAM CRANCH,
CHIEF JUDGE OF THE COURT.
VOLUME II.
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INDEX

OF THE CASES REPORTED IN VOL. II.

A.			
	Page		Page
Abbott, Neil <i>v.</i>	193	Bank of Columbia <i>v.</i> Bunnell	306
Adams, Bennett <i>v.</i>	551	<i>v.</i> Cook	574
Gelston <i>v.</i>	440	<i>v.</i> Jones	516
<i>v.</i> Kincaid	422	<i>v.</i> King	570
<i>v.</i> Whiting	132	<i>v.</i> Lawrence	510
Afflick, Thompson <i>v.</i>	46, 67	<i>v.</i> Mackall	631
Alexander, Conway <i>v.</i>	57	<i>v.</i> Ott	529, 575
Alice, negro, <i>v.</i> Morté	485	Renner <i>v.</i>	310
Anderson's case	243	<i>v.</i> Sweeny	704
Anderson, United States <i>v.</i>	157	Bank of Metropolis <i>v.</i> Brent	530
Andrews, Rockville, T. P. <i>v.</i>	451	<i>v.</i> Walker	294, 361
Appler, Travers <i>v.</i>	234	Bank of United States <i>v.</i> Barry	307
Arell <i>v.</i> Marsteller	11	<i>v.</i> Brent	696
Arguelles <i>v.</i> Wood	579	<i>v.</i> Crabb	299
Armat <i>v.</i> Union Bk. of Georgetown	180	<i>v.</i> Kurtz	342
Ash <i>v.</i> Hayman	452	<i>v.</i> McLaugh-	
Auld <i>et al.</i> <i>v.</i> Mandeville	167	lin	20
Auld <i>v.</i> Peyton	182	<i>v.</i> Oneale	466
Ault <i>v.</i> Elliot	372	<i>v.</i> Roberts	15
Averill <i>v.</i> Tucker	544	<i>v.</i> Smith	319
		<i>v.</i> Swann	368
		Bank of Washington <i>v.</i> Brent	538
		Brent <i>v.</i>	517
		<i>v.</i> Kurtz	110
		<i>v.</i> Peltz	241
		<i>v.</i> Peirson	685
		<i>v.</i> Reynolds	289
		<i>v.</i> Way	249
		Bannatyne & Co., Herbert <i>v.</i>	12
		Barrell, Edmonson <i>v.</i>	228
		<i>v.</i> Simonton	657
		Barrett, Williams <i>v.</i>	673
		Barron, Riggs <i>v.</i>	678
		Barry, Bank of U. S. <i>v.</i>	307
		Rice <i>v.</i>	447
		Bartleman, Scott <i>v.</i>	313
		<i>v.</i> Smarr	16
		Bascadore, United States <i>v.</i>	25, 30
		Basye, Veitch & Co. <i>v.</i>	6
B.			
Baker, Corp. of Georgetown <i>v.</i>	291		
<i>v.</i> French	539		
& Dyer <i>v.</i> Glover	682		
<i>v.</i> Mix	525		
United States <i>v.</i>	615		
Balderston <i>v.</i> Manro	623		
Ball, negro Emanuel <i>v.</i>	107		
negro S. Dunbar <i>v.</i>	261		
negro Violette <i>v.</i>	102		
Ballard <i>v.</i> Edmonston	419		
Bank of Alexandria <i>v.</i> Clarke	164		
<i>v.</i> Deneale	488		
<i>v.</i> Saunders	183		
<i>v.</i> Wilson	5		
<i>v.</i> Young	52		
<i>et al.</i>			

	Page		Page
Cassin, Palmer <i>v.</i>	66	Corp. Washington, Boswell <i>v.</i>	18
Catalino, Bussard <i>v.</i>	421	Botelot <i>v.</i>	676
Cathcart, Robinson <i>v.</i>	590	Clark <i>v.</i>	502
Catlett <i>v.</i> Cooke	9	Costin, Billy <i>v.</i>	254
<i>et ux. v.</i> Fairfax	99	Delany <i>v.</i>	459
Cazenove <i>v.</i> Darrel, <i>et al.</i>	444	Friend <i>v.</i>	19
Central Bank <i>v.</i> Tayloe	427	Levy Court <i>v.</i>	175
Centre <i>v.</i> Keene	198	McGunnigle <i>v.</i>	460
Chapman <i>et. al.</i> , Johnston <i>v.</i>	32	<i>v.</i> Strother	542
Thornton <i>v.</i>	214	United States <i>v.</i>	174
Charles, negro, United States <i>v.</i>	76	<i>v.</i> Walker	293
Chenault, Dorsey <i>v.</i>	316	White <i>v.</i>	337
United States <i>v.</i>	70	<i>v.</i> Young	632
Chester, Riggs <i>v.</i>	637	Corse, Com. C. Alexandria <i>v.</i>	363
Clagett's case,	217	Coumbe <i>v.</i> Nairn	676
Clara, negro, <i>v.</i> Ewell	208	Cox <i>et. al.</i> Hawkins <i>v.</i>	173
Clark <i>v.</i> Corp. Washington	502	<i>v.</i> Jones	370
United States <i>v.</i>	620	Coyle, Brent <i>v.</i>	287, 348
Clarke, Bank Alexandria <i>v.</i>	461	Dyer <i>v.</i>	618
negro Jo. Thompson <i>v.</i>	145	<i>v.</i> Gozzler	625
Peltz <i>v.</i>	703	Crabb, Bank U. S. <i>v.</i>	299
<i>v.</i> Threlkeld	408	Craig <i>v.</i> Reintzel	128
United States <i>v.</i>	152, 158	United States <i>v.</i>	36
Clements, United States <i>v.</i>	30	Craik <i>v.</i> Hilton	116
Cocke <i>et. al.</i> , Munroe <i>v.</i>	465	Crandell, Burford <i>v.</i>	86
Coleman, Smith <i>v.</i>	237	Gilpin <i>v.</i>	57
Columbia Ins. Co., Saunderson <i>v.</i>	218	United States <i>v.</i>	373
Gardner <i>v.</i>	473, 550	Craven, Williams <i>v.</i>	60
Stuart <i>v.</i>	442	Crawford <i>et al. v.</i> Summers <i>et al.</i>	312
United States <i>v.</i>	266	<i>v.</i> Milligan	226
Cornegyss <i>v.</i> Robb,	141	Crawford's case	454
Vasse <i>v.</i>	564	Crease, Smith <i>v.</i>	481
Com. & F. Bank <i>v.</i> Patterson	316	Crittenden <i>v.</i> Strother	464
Com. C. Alexandria <i>v.</i> Brockett	13	U. Bank, Georgetown <i>v.</i>	238
<i>v.</i> Corse	363	Cross <i>v.</i> Blanford	677
<i>v.</i> Mandeville	224	White <i>v.</i>	17
<i>v.</i> Wise	27	Curray <i>v.</i> McMunn	51
Connelly's case	415	Custiss <i>v.</i> Geo. 'tn. & Alexan. Turnp.	81
Conner <i>v.</i> Levering	163	Cutting, Carter <i>v.</i>	58
Contee <i>v.</i> Garner	162		
Conway <i>v.</i> Alexander	57	D.	
<i>v.</i> Sherron	80		
Conway's Ex'ors., Cook <i>v.</i>	99	Daniel, negro, <i>v.</i> Kincheloe	295
Cook, Bank Columbia <i>v.</i>	574	Donoghue's case	466
<i>v.</i> Beall	264	Darius Clagett's case	217
<i>v.</i> Conway	99	Darrel <i>et. al.</i> , Cazenove <i>v.</i>	444
& Clare, Union Bank <i>v.</i>	218	Darnall <i>v.</i> Talbot	249
Cooke, Catlett <i>v.</i>	9	Davidson <i>v.</i> Burr	515
<i>v.</i> O'Brien	17	Tayloe <i>v.</i>	134
Coombe, Homans <i>v.</i>	681	Davies <i>v.</i> Davies	105
<i>v.</i> Meade	547	Davis <i>v.</i> Beverly <i>et. al.</i>	35
Cooper, Keene <i>v.</i>	215	Brent <i>v.</i>	632
Corcoran <i>v.</i> Hodges	452	<i>v.</i> Forrest	23
Holmead <i>v.</i>	119	Newman <i>v.</i>	16
Corp. Georgetown <i>v.</i> Baker	291	<i>v.</i> Robb	458
Boothe <i>v.</i>	356	<i>v.</i> Van Zandt	208
Pritchard <i>v.</i>	191	Day <i>v.</i> Hackley	251

	Page		Page
Dean <i>v.</i> Marsteller	121	F.	
<i>v.</i> Tucker	26	Fairfax, Catlett <i>et ux. v.</i>	99
Deane, <i>Ex parte</i>	125	<i>v.</i> Fairfax	25
Delany <i>v.</i> Corp. Washington	459	Hopkins <i>v.</i>	134
Deneale, Bank Alexandria <i>v.</i>	488	Farmers Bank <i>v.</i> Lloyd	411
negro Betty <i>v.</i>	156	Patriotic Bank <i>v.</i>	560
Stump <i>v.</i>	640	<i>v.</i> Robbins	471
<i>v.</i> Young	200, 418	& Mechanics Bank <i>v.</i> Mel-	
Denny <i>v.</i> Henderson	121	vin <i>et al.</i>	614
Devaughn's case	501	Farrow, Lewis <i>v.</i>	571
Dick, United States <i>v.</i>	409	Fearson, Nicholls <i>v.</i>	526, 703
Diggs, negro Gusty <i>v.</i>	210	Fenton <i>v.</i> Braden	550
Dix <i>v.</i> Nichols	581	Fenwick, Goulding <i>v.</i>	350
Dixon <i>v.</i> Waters	527	Fislay, Bannatyne & Co., Herbert <i>v.</i>	12
United States <i>v.</i>	92	Fish, McDaniel <i>v.</i>	160
Dobbin <i>v.</i> Foyles	65	Fire Ins. Co., Lewis <i>v.</i>	500
Dorsey <i>v.</i> Chenault	316	Fitzhugh <i>v.</i> Blake	37
Dougherty, Harper <i>v.</i>	284	Force, King <i>v.</i>	208
Douglass, Ruth, United States <i>v.</i>	94	Forrest, Davis <i>v.</i>	23
Duckworth, Minifie <i>v.</i>	39	Wood <i>v.</i>	303
Dundas <i>et al.</i> , Dunlop & Co. <i>v.</i>	86	Fowle, M'Clean <i>v.</i>	118
Dunlap, Watson <i>v.</i>	14	Foxall, Turner <i>v.</i>	324
Dunlop & Co. <i>v.</i> Hepburn <i>et al.</i>	86	Foyles, Dobbin <i>v.</i>	65
Duval, United States <i>v.</i>	42	King <i>v.</i>	303
Dyer <i>v.</i> Coyle	684	Franklin Bank <i>v.</i> Hipkins <i>et al.</i>	315
Lane <i>v.</i>	349	French, Baker <i>v.</i>	539
		Stewart <i>v.</i>	300
E.		<i>v.</i> Venable	509
Edds, Mickum <i>v.</i>	568	Frere <i>v.</i> Mudd	407
Edmonson <i>v.</i> Barrell	228	Friend, Cana <i>v.</i>	370
Edmondston, Ballard <i>v.</i>	419	<i>v.</i> Corp. Washington	19
Eliason, Union Bank <i>v.</i>	629, 667	Frye, Patriotic Bank <i>v.</i>	684
Ellicott <i>v.</i> Smith	543		
Elliot, Ault <i>v.</i>	372	G.	
<i>v.</i> Hayman	678	Gaither <i>v.</i> Lee	205
Ringgold <i>v.</i>	462	Gales, Lapeyre <i>et al. v.</i>	291
Thomas <i>v.</i>	432	Gardner <i>v.</i> Col. Ins. Co.	473, 550
Emerson <i>v.</i> Beale	349	<i>et al. v.</i> Tennison	338
English, McElroy <i>v.</i>	528	Garey <i>v.</i> Johnson	107
<i>v.</i> Tyler	200	Garner, Contee <i>v.</i>	162
Entwisle <i>v.</i> Bussard	331	Garrett <i>v.</i> Woodward <i>et al.</i>	190
Esther, Lewis <i>v.</i>	423	Gassaway <i>v.</i> Jones	334
Evans <i>v.</i> Evans	240	Gee, United States <i>v.</i>	163
Miller <i>v.</i>	72	Gelston <i>v.</i> Adams	440
Morgan <i>v.</i>	70	Georgetown & Alexandria Turn-	
Fwell, Law <i>v.</i>	144	pike Co., Custiss <i>v.</i>	81
Negro Clara <i>v.</i>	208	Gilham, Welford <i>v.</i>	556
Ex parte Bennett	612	Gillis <i>et al.</i> , United States <i>v.</i>	41
Burr	379	Gilman <i>v.</i> Herbert	58
Deane	125	<i>v.</i> King & Co.	48
Hadry	364	Potomac Co. <i>v.</i>	213
Henry Knowles	576	Gilpin <i>v.</i> Crandell	57
Minor	401	<i>v.</i> Plummer	51
Reardon	639	Gird, negro Rob. Simmons <i>v.</i>	100
Smith	693	Gittings, Birch <i>v.</i>	66
Win. Wilson	7		

	Page		Page
GitTINGS, v. Burch	97	Hellen v. Beatty	29
Glover, Baker & Dyer v.	682	Henderson, Denny v.	121
Johnson v.	678	et al., Irwin v.	167
Owen et al. v.	522, 578	Offutt v.	553
Ringgold v.	427	Ricketts et al. v.	157
Smith et al. v.	331	Henny Gray, United States v.	675
Gloyd, McCleod v.	261	Herbert v. Bannatyne & Co.	12
Godley, United States v.	153	v. Finlay, Bannatyne & Co.	12
Golding, United States v.	212	Gilman v.	58
Goldsborough v. Jones	305	Whittemore v.	245
v. McWilliams	401	Hepburn et al., Dunlop & Co. v.	86
Good v. Sprigg	172	Mima Queen v.	3
Gorman v. Marsteller	311	Heyer et al. v. Wilson	369
Goulding v. Fenwick	350	Higgs, Hodge v.	552
Goszler, Mackall v.	240	Hight, Travers v.	41
Gozler, Union Bank v.	349	Hilton, Craik v.	116
Gozzle, Coyle v.	625	Hipkins et al., Franklin Bank v.	315
Graeff, Riggs v.	298	Hodge v. Higgs	552
Graham v. Woodward et al.	190	Nicholls v.	582
Grant v. Bontz	184	Hodges, Corcoran v.	452
Gray, Henny, United States v.	675	Hoffman, Smith v.	651
et al. v. Mechanics Bank	51	Hogan, Bell v.	21
v. Reardon	219	v. Ingle	352
Greatrake v. Brown	541	Oneil v.	524
Green, negro Sam v.	165	Holmead v. Corcoran	119
& Johnson, Turner v.	202	v. Maddox	161
United States v.	520	Holmes v. Bussard	401
Greenway v. Roberts	246	Holy et al. v. Rhodes	245
Gregg v. Bontz	115	Homans v. Coombe	681
Griffith, Johnson v.	199	Hopkins, Fairfax v.	134
Mackbee v.	336	Williams v.	98
United States v.	366	Hooe, Miller v.	622
Grigsby v. Love	413	Hough, Moore v.	561
Grundy v. Young	114	v. Smoot	318
Gullat & Scott v. Tucker	33	Howard v. United States	259
		House v. Cash	73
H.		Howland v. Marine Ins. Co.	474
		Renner v.	441
Hackley, Day v.	251	United States v.	508
Hadfield, Rhodes v.	566	Hubbard, Wells v.	292
Hadry, Ex parte	364	Huddlestons, Underwood v.	76, 93
Hall, Lynn v.	52	Humphries v. Tench	337
Offut v.	363	Hutchinson et al. v. Peyton	365
Watson v.	154	Hyer v. Wilson	633
Whann v.	4		
Woodward v.	235	I.	
Haller v. Beall	227		
Hammond, Brockett v.	56	Ingle, Hogan v.	352
Harper v. Dougherty	284	Orr v.	193
Haukey, United States v.	65	Irwin v. Brown	311
Hawkins v. Cox et al.	173	v. Henderson	167
Hayman, Ash v.	452		
Elliott v.	678	J.	
Hazel, Nicholls v.	95		
Hedges, United States v.	43	Jack Neale, negro, United States v.	211
Heineke, Van Ness v.	259	Jackson, Keene v.	166
Heise, Trundle v.	44	Jacobs v. Levering	117

	Page		Page
Janney, Boone v.	312	Kurtz, Bank of United States v.	342
v. Mandeville	31	Bank of Washington v.	110
Neale v.	188	v. Beatty	699
Patton v.	71	v. Bogeariff	702
& Co. v. Smith	499	v. Jones	433
Jenkins v. Boyle	120		
Muir v.	18		L.
v. Porter	116	Lackland, Melvin v.	636
Jones, Bank Columbia v.	516	Ladd v. Ladd	505
Cox v.	370	Lambert, United States v.	137
Gassaway v.	334	Lane v. Dyer	319
Goldsborough v.	305	Lapeyre <i>et al.</i> v. Gales	291
v. Johns	426	Law v. Ewell	144
v. Kumper	535	Scott v.	530
Kurtz v.	433	La vren v. Bank of Columbia v.	510
Ott v.	351	Leat, Wager v.	92
v. Smoot	207	Lee v. Cassin	112
Johns, Jones v.	426	Gaither v.	205
Nicholls v.	66	Patons & Butcher v.	646
Johnson, Garey v.	107	v. Patterson	199
v. Glover	678	Smoot v.	459
v. Griffith	199	United States v.	462
v. Owens	160	Lee, R. H., United States v.	104
Simpson v.	107	Legg, Simpson v.	132
Smith v.	615	Lexen v. Wright	45
<i>et al.</i> Turner v.	287	Lessford, Keiler v.	190
United States v.	21	Letty, negro, v. Lowe	634
Walker v.	202	Levering, Conner v.	163
Johnston v. Chapman <i>et al.</i>	32	Jacobs v.	117
Jordan v. Sawyer	373	Levy Court v. Corp. Washington	175
		v. Ringgold	659
K.		Lewis v. Esther	423
Kane v. Love	429	v. Farrow	571
Keene, Centre v.	198	v. Fire Insurance Co.	500
v. Cooper	215	Scott v.	203
v. Jackson	166	v. Smith	571
Keiler v. Lessford	190	v. Spalding	68
Keirll v. McIntire	670	Lindsay & Hill, McCobb v.	215
Kell, negro Panny v.	412	Lingan, negro Jack Garretson v.	236
Keaper, Jones v.	535	Little, Patriotic Bank v.	627
Kirwell, Masterson v.	69	Lloyd, P. Bank of Alex'a. v.	411
Kincaid, Atkins v.	422	Locke v. Cannon	186
Kinney, negro Daniel v.	295	Logan, United States v.	259
King, Bank Columbia v.	570	Loring, negro Sampson v.	218
v. Force	208	Love v. Byrd	156
v. Hayes	303	Gingsby v.	413
Gilman v.	48	Kane v.	429
Shirley v.	205	Mandeville v.	249
v. Sen	234	Lowe, negro Letty v.	654
Knox v. Lippert	576	Lowry, Pann v.	628
v. Parrott	93	Lynn v. Hall	52
Simpson v.	129	Mechanics Bank v.	217, 246
v. Stewart	457	United States v.	109
Knox v. L. S. Sutters	12		M.
Kruger, United States v.	252	Mackall, Bank of Columbia v.	333
Kurtz v. Bank of Columbia	701		

	Page		Page
Mackall <i>v.</i> Goszler	240	McLaughlin <i>v.</i> Stephens	148
Union Bank <i>v.</i>	695	McMunn, Curray <i>v.</i>	51
Mackbee <i>v.</i> Griffith	336	McNemara, United States <i>v.</i>	45
Maddox, Holmead <i>v.</i>	161	McPherson, Talbot <i>v.</i>	281
<i>v.</i> Stewart	523	McSherry <i>v.</i> Queen	406
<i>v.</i> Thornton	260	McWilliams, Goldsborough <i>v.</i>	401
Magruder <i>v.</i> Bowie <i>et al.</i>	577	Meade, Coombe <i>v.</i>	547
Magruder's case,	626	Mechanics Bank, Gray <i>v.</i>	51
Magruder, McCormick <i>v.</i>	227	<i>v.</i> Lynn	217, 246
Riggs <i>v.</i>	113	<i>v.</i> Taylor	217, 507
Union Bank <i>v.</i>	687	Melvin <i>et al.</i> , Farm. & Mech.	
Mandeville, Auld <i>et al. v.</i>	167	Bank <i>v.</i>	614
Com. Coun. Alex'a <i>v.</i>	224	<i>v.</i> Lackland	636
Janney <i>v.</i>	31	Mickum <i>v.</i> Edds	568
<i>v.</i> Love	249	<i>v.</i> Paul	568
Munroe <i>v.</i>	187	Middleton, Shields <i>v.</i>	205
Sheehy <i>v.</i>	15	Smith <i>v.</i>	233
Welch <i>v.</i>	82	Milburn <i>v.</i> Burton	639
Young <i>v.</i>	444	United States <i>v.</i>	501
Manro, Balderston <i>v.</i>	623	Miller <i>v.</i> Evans	72
Marine Ins. Co., Howland <i>v.</i>	474	<i>v.</i> Hooe	622
Simmes <i>v.</i>	618	Masseletti <i>v.</i>	313
Marsteller, Arell <i>v.</i>	11	McClellan <i>v.</i>	620
Dean <i>v.</i>	121	United States <i>v.</i>	247
Gorman <i>v.</i>	311	<i>v.</i> Wheaton <i>et al.</i>	41
<i>v.</i> McClellan	8	<i>v.</i> Young	53
Mason <i>v.</i> Muncaster	274	Milligan, Crawford <i>v.</i>	226
Muncaster <i>v.</i>	521	<i>v.</i> Mayne	210
negress Matilda <i>v.</i>	343	Thompson <i>v.</i>	207
Stone <i>v.</i>	431	Mills <i>v.</i> Wilson	216
United States <i>v.</i>	410	Minifie <i>v.</i> Duckworth	39
Masseletti <i>v.</i> Miller	313	Neale <i>v.</i>	16
Masterson <i>v.</i> Kidwell	669	United States <i>v.</i>	109
Matilda, negress, <i>v.</i> Mason	343	Minor, <i>ex parte</i>	404
Mattingly <i>v.</i> Smith	158	Slade <i>v.</i>	139
Maul <i>v.</i> Scott	367	Minta Butler, United States <i>v.</i>	75
Maupin <i>et ux. v.</i> Pic	38	Mix, Baker <i>v.</i>	525
Mauro <i>v.</i> Botelot	372	Moore <i>v.</i> Hough	561
Varnum <i>v.</i>	425	<i>v.</i> Shields	529
Maxwell, Rockville T. <i>v.</i>	451	Morgan <i>v.</i> Evans	70
May, United States <i>v.</i>	507	Reintzel <i>v.</i>	20
Maye <i>v.</i> Carbery	336	<i>v.</i> Rowan	148
Mayne, Milligan <i>v.</i>	210	Moriarty, Young <i>v.</i>	42
McCaffrey, Skinner <i>v.</i>	193	Morté <i>et al.</i> , negress Alice <i>v.</i>	485
McClellan <i>v.</i> Fowle	118	Mott, Riddle <i>v.</i>	73
Marsteller <i>v.</i>	8	<i>v.</i> Smith	33
<i>v.</i> Miller	620	Moxley, United States <i>v.</i>	61
McCleod <i>v.</i> Gloyd	264	Mudd, Frere <i>v.</i>	407
McCobb <i>v.</i> Lindsay & Hill	215	Muller, Jenkins	18
<i>v.</i> Tyler	195	Munster, Mason <i>v.</i>	271
McCormick <i>v.</i> Magruder	227	<i>v.</i> Mason	521
McDaniel <i>v.</i> Fish	100	Munroe <i>v.</i> Coward <i>et al.</i>	105
McElroy <i>v.</i> English	545	<i>v.</i> Mandeville	187
McGuire, Snowden <i>v.</i>	6	<i>v.</i> Robertson	262
McGuire <i>v.</i> Corp. Washington	460	<i>v.</i> Towers	187
McIntire, Keirll <i>v.</i>	670	Murphy <i>et al.</i> , United States <i>v.</i>	186
McLaughlin, Bank U. S. <i>v.</i>	25	Murphy <i>v.</i> Rock	677

N.		Page		Page
Nairn	Counbe v.	676	Nicholls v. Warfield	290, 429
Neale	v. Janney	188	Nicholson v. Patton	164
	v. Minifie	16	Noland, Baugh v.	2
	v. Peyton	313	Noon, Sears v.	220
	Queen v.	3		
Neg.	Alice v. Morté <i>et al.</i>	485	O.	
	Amelia v. Caldwell	418	O'Brien, Cooke v.	17
	Betty v. Deneale	156	Offut v. Hall	363
	Calvin, United States v.	640	Offutt v. Henderson	553
	Charles, United States v.	76	Okeley v. Boyd	176
	Clara v. Ewell	208	Oneale, Bank U. S. v.	466
	Daniel v. Kincheloe	295	v. Beall	569
	Ellick, United States v.	412	<i>et al.</i> , United States v.	183
	Emanuel v. Ball	101	O'Neale v. Willis	108
	Fanny Tarlton v. Tippet	463	Oneil v. Hogan	524
	Fanny v. Keil	412	Ormsbey v. Tingey	128
	Gusty v. Diggs	210	Orr v. Ingle	193
	Henry Bowen, U. States v.	133	Thorp v.	335
	Humphries v. Tench	337	Ott, Bank Columbia v.	529, 575
	Jack Garretson v. Lingan	236	v. Jones	351
	Jack Neale, United States v.	241	Otteridge v. Thompson	108
	Jo. Thompson v. Clarke	145	Overton, United States v.	42
	Leonard Dunbar v. Ball	261	Owen <i>et al.</i> v. Blanchard	418
	Letty v. Lowe	634	v. Glover	522, 578
	Matilda v. Mason	343	Owens, Johnson v.	160
	Patrick, United States v.	66		
	Peter, United States v.	98	P.	
	<i>et al.</i> v. Preuss	561	Paine & Miller, Rudd & Brush v.	9
	Pompey, United States v.	246	Palmer v. Cassin	66
	Randall, United States v.	412	United States v.	11
	Rebecca v. Pumphrey	511	Young v.	625
	Richard, United States v.	439	Park v. Willis	83
	Robert Simmons v. Gird	100	Parrott, Knowles v.	93
	Sam v. Green	165	Patons & Butcher v. Lee	646
	Sam Bias v. Rose	159	Patriotic Bank v. Farmers Bank	560
	Sam Reeler v. Robinson	220	v. Frye	684
	Sampson v. Loring	318	v. Little	627
	Sarah v. Taylor	155	Patterson, Com. & F. Bank v.	346
	Tom, United States v.	114	Lee v.	199
	Vincent Gardner v. Simpson	405	Patton v. Janney	71
	Violette v. Ball	102	Nicholson v.	164
	Walter Thomas v. Scott	2	v. Taylor <i>et al.</i>	71
	William Jordan v. Sawyer	373	Vowel v.	312
Neil	v. Abbott	193	Paul v. Lowry	628
Newman	v. Davis	16	Mickum v.	568
Newton's case		467	Peirson, Bank Washington v.	685
Newton <i>et al.</i> v. Reardon		49	Peltz, Bank Washington v.	241
v. Weaver <i>et al.</i>		685	v. Clarke	703
Nichols Young's case		453	Perry v. Rhodes	37
Nichol v. Savannah Steamship Co.		211	Peters v. Breckenridge	518
Nichols, Dix v.		581	Peyton, Auld v.	182
Pearson		526, 703	Hutchinson v.	365
Hazel		95	Neale v.	313
v. Hodge		582	v. Verch <i>et al.</i>	123
v. Johns		66	Piatt, Brown v.	253

	Page		Page
Pic, Beeding <i>v.</i>	152	Riggs <i>v.</i> Stewart	171
Maupin <i>et ux. v.</i>	38	<i>v.</i> Tayloe	687
Pickering, United States <i>v.</i>	117	Union Bank, Georgetown <i>v.</i>	204
Pierce <i>v.</i> Reintzel	101	Rigsby, United States <i>v.</i>	364
Piles <i>v.</i> Plum <i>et al.</i>	32	Ringgold, Blagrove <i>v.</i>	407
Plum & Swan, Piles <i>v.</i>	32	<i>v.</i> Elliot	462
Plummer, Gilpin <i>v.</i>	51	<i>v.</i> Glover	427
Pocklington, United States <i>v.</i>	293	Levy Court <i>v.</i>	659
Polly Rollinson, United States <i>v.</i>	13	<i>v.</i> Renner	263
Pompey, negro, United States <i>v.</i>	246	Ritchie <i>v.</i> Stone	258
Porter, Jenkins <i>v.</i>	116	Robb, Comegyss <i>et al. v.</i>	141
<i>v.</i> Rapine	47	Davis <i>v.</i>	458
United States <i>v.</i>	60	Robbins, Farmers Bank <i>v.</i>	471
Wilson <i>v.</i>	458	Robert, Munro <i>v.</i>	262
Potomac Co. <i>v.</i> Gilman	243	Roberts, Bank U. S. <i>v.</i>	15
Powling <i>v.</i> Varnum	423	Greenway <i>v.</i>	246
Preuss, negro Peter <i>et al. v.</i>	561	<i>v.</i> Reintzel	235
Pritchard <i>v.</i> Corp. Georgetown	191	Robertson, Munro <i>v.</i>	262
Pumphrey, neg. Rebecca <i>v.</i>	514	Robin Hood, United States <i>v.</i>	133
Pyfer, Calder <i>v.</i>	430	Robinson <i>v.</i> Cathcart	590
Q.		Reeler <i>v.</i>	220
Queen, Mima, Boone <i>v.</i>	371	Rockville Turnpike <i>v.</i> Andrews	451
<i>v.</i> Hepburn	3	<i>v.</i> Maxwell	451
McSherry <i>v.</i>	406	<i>v.</i> Van Ness	449
Weightman <i>v.</i>	172	Rose, negro Sam <i>v.</i>	159
Priscilla <i>v.</i> Neale Francis	3	United States <i>v.</i>	567
R.		Rounsavel <i>v.</i> Scholfield	139
Rapine, Porter <i>v.</i>	47	United States <i>v.</i>	133
Ray, United States <i>v.</i>	141	Rowan, Morgan <i>v.</i>	148
Reardon, <i>Ex parte</i>	639	Rudd <i>v.</i> Paine	9
Gray <i>v.</i>	219	Rutherford, United States <i>v.</i>	528
Newton <i>v.</i>	49	S.	
Read <i>v.</i> Carberry	417	Sampson <i>v.</i> Johnson	107
Betty, United States <i>v.</i>	159	Sanderson <i>v.</i> Col. Ins. Co.	218
United States <i>v.</i>	198	Sanford <i>v.</i> Boyd	78
Reeler, neg. Sam, <i>v.</i> Robinson	220	Sarah, negro, <i>v.</i> Taylor	155
Reintzel, Craig <i>v.</i>	128	Sardo, Bestor <i>v.</i>	260
<i>v.</i> Morgan	20	Saunders, Bank Alexandria <i>v.</i>	183
Pierce <i>v.</i>	101	Savannah Steamship Co., Nichols <i>v.</i>	211
Roberts <i>v.</i>	235	Sawyer, neg. Wm. Jordan <i>v.</i>	373
Renner <i>v.</i> Bank Columbia	310	Scholfield, Rounsavel <i>v.</i>	139
<i>v.</i> Howland	441	Swann <i>v.</i>	140
Ringgold <i>v.</i>	263	Taylor <i>v.</i>	315
Resler, Wise <i>v.</i>	182, 199	<i>et al. v.</i> Union Bank	115
Reynolds, Bank Washington <i>v.</i>	289	Scott <i>v.</i> Bartleman	313
Rhodes <i>v.</i> Hadfield	566	<i>v.</i> Law	530
Holy & Suckley <i>v.</i>	245	<i>v.</i> Lewis	203
Perry <i>v.</i>	37	Maul <i>v.</i>	367
Rice <i>v.</i> Barry	447	<i>v.</i> Tucker	33
Ricketts <i>et al. v.</i> Henderson	157	neg. Walter <i>v.</i>	2
United States <i>v.</i>	553	Sears <i>v.</i> Noon	220
Riddle <i>v.</i> Mott	73	Selby, Way <i>v.</i>	44
Riggs <i>v.</i> Barrow	678	Sharpless <i>v.</i> Knowles	129
<i>v.</i> Chester	637	Sheehy <i>v.</i> Mandeville	15
<i>v.</i> Graeff	298	Sherburne <i>v.</i> King <i>et al.</i>	205
<i>v.</i> Magruder	143	<i>v.</i> Semmes	446

	Page		Page
Sherburne, Semmes v.	534, 637	Strother, Corp. Washington v.	542
Sherron, Conway v.	80	Crittenden v.	464
Shields v. Middleton	205	Stuart v. Col. Ins. Co.	442
Moore v.	529	Stump v. Deneale	640
Short v. Wilkinson	22	Summers <i>et al.</i> , Knox <i>et al.</i> v.	12
Sims's Bail, Burns v.	75	Swann, Bank U. S. v.	368
Simin, King v.	234	v. Bowie	221
Simmes v. Marine Ins. Co.	618	v. Scholfield	140
v. Sherburne	534, 637	Sweeny, Bank Columbia v.	704
Sherburne v.	446		
Simmons, Thorpe v.	195	T.	
Simonton, Barrell v.	657	Talbot, Darnall v.	249
Winter v.	585	v. McPherson	281
Simpson v. Legg	132	Taylor, Central Bank v.	427
neg. Vincent v.	405	v. Davidson	434
Skinner v. McCaffrey	193	Riggs v.	687
Slacum v. Smith	149	Somers v.	138
Slade v. Minor	139	v. Turner	203
Smallwood v. Worthington	431	v. Varden	37
Smarr, Bartleman v.	16	v. Wharfield	248
Smith, Bank U. S. v.	319	Taylor, Mechanics Bank v.	217, 507
Bennet, United States v.	111	neg. Sarah v.	155
v. Coleman	237	<i>et al.</i> , Patton v.	71
v. Crease	481	v. Scholfield	315
Ellicott v.	543	Tench, neg. Humphries v.	337
<i>Ex parte</i>	693	Tennison, Gardner <i>et al.</i> v.	338
v. Glover	334	Thomas v. Elliot	432
v. Hoffman	651	United States v.	36
Janney & Co. v.	499	Thompson, v. Afflick	46, 67
v. Johnson	615	v. Carberry	35, 39
Lewis v.	571	v. Milligan	207
Mattingly v.	158	Otteridge v.	108
v. Middleton	233	United States v.	409
Mott v.	33	Thornton v. Chapman	244
Slacum v.	149	Maddox v.	260
Stewart v.	615	Thorp v. Orr	335
Vasse v.	31	v. Simmons	195
v. Woodward <i>et al.</i>	226	Threlkeld, Clarke v.	408
Smithers, United States v.	38	Williams v.	307
Smoot, Hough v.	318	Tingey, Ormesby v.	128
Jones v.	207	Tippet, neg. Fanny v.	463
v. Lee	459	Tompkins, United States v.	46
Snowdon v. Maguire	6	Towers, Munroe v.	187
Somers v. Taylor	138	Travers v. Appler	234
Spaulding, Burch v.	422	v. Bell	160
Lewis v.	68	v. Hight	41
Sprigg, Good v.	172	Traverse v. Beall	113
Stephens, McLaughlin v.	148	Triplett & Neale v. Van Name <i>et al.</i>	332
Stewart v. French	300	v. Warfield	237
Knowles v.	457	Trundle v. Heise	44
Maddox v.	523	Tucker, Averill v.	541
Riggs v.	171	Deane v.	26
v. Smith	615	Gullat & Scott v.	33
Stone v. Mason	431	Turberville, Wilson v.	27
Ritchie v.	258	Turner v. Foxall	324
v. Stone	119	v. Johnson <i>et al.</i>	287
Stott, United States v.	552	v. Green & Johnson	202
Strong, United States v.	251	Taylor v.	203

	Page		Page
Tyler, English <i>v.</i>	200	United States <i>v.</i> Krouse	252
McCobb <i>v.</i>	199	<i>v.</i> Lambert	137
Violette <i>v.</i>	200	<i>v.</i> Lee	104, 462
U.		<i>v.</i> Logan	259
Underwood <i>v.</i> Huddleston	76, 93	<i>v.</i> Lynn	309
Union Bank Alex. <i>v.</i> Cook & Clare	218	<i>v.</i> Mason	410
Scholfield <i>et al.</i> <i>v.</i>	115	<i>v.</i> May	507
Georgetown, Armat <i>v.</i>	180	<i>v.</i> McNemara	45
<i>v.</i> Crittenden	238	<i>v.</i> Millburn	501
<i>v.</i> Eliason	629, 667	<i>v.</i> Miller	247
<i>v.</i> Gozler	349	<i>v.</i> Minifie	109
<i>v.</i> Mackall	695	<i>v.</i> Minta Butler	75
<i>v.</i> Magruder	687	<i>v.</i> Moxley	64
<i>v.</i> Riggs	204	<i>v.</i> Murdoch	486
United States <i>v.</i> Anderson	157	<i>v.</i> neg. Calvin	640
<i>v.</i> Baker	615	<i>v.</i> neg. Charles	76
<i>v.</i> Bascadore	25, 30	<i>v.</i> neg. Ellick	412
<i>v.</i> Bates	1, 405	<i>v.</i> neg. Henry Bowen	133
<i>v.</i> Betsey Ware	477	<i>v.</i> neg. Jack Neale	241
<i>v.</i> Betty Read	159	<i>v.</i> neg. Patrick	66
<i>v.</i> Bill	202, 518	<i>v.</i> neg. Peter	98
<i>v.</i> Black	195	<i>v.</i> neg. Pompey	246
<i>v.</i> Blacklock	166	<i>v.</i> neg. Randall	412
<i>v.</i> Book	294	<i>v.</i> neg. Richard	439
<i>v.</i> Brockett	441	<i>v.</i> neg. Tom	114
<i>v.</i> Bruce	95	<i>v.</i> O'Neale	183
<i>v.</i> Burford	102	<i>v.</i> Overton	42
<i>v.</i> Butler	75	<i>v.</i> Palmer	11
<i>v.</i> Carberry	358	<i>v.</i> Pickering	117
<i>v.</i> Carnot	469	<i>v.</i> Pocklington	293
<i>v.</i> Carr	439	<i>v.</i> Polly Rollinson	13
<i>v.</i> Carrico	110, 446	<i>v.</i> Porter	60
<i>v.</i> Carter	243	<i>v.</i> Ray	141
<i>v.</i> Chenault	70	<i>v.</i> Read	198
<i>v.</i> Clarke	152, 158, 620	<i>v.</i> Ricketts	553
<i>v.</i> Clements	30	<i>v.</i> Rigsby	364
<i>v.</i> Col. Ins. Co.	266	<i>v.</i> Robin Hood	133
<i>v.</i> Corp. Washington	174	<i>v.</i> Rose	567
<i>v.</i> Craig	36	<i>v.</i> Rounsavel	133
<i>v.</i> Crandell	373	<i>v.</i> Rutherford	528
<i>v.</i> Dick	409	<i>v.</i> Smith	111
<i>v.</i> Dixon	92	<i>v.</i> Smithers	38
<i>v.</i> Douglass	94	<i>v.</i> Stott	552
<i>v.</i> Duvall	42	<i>v.</i> Strong	251
<i>v.</i> Gee	163	<i>v.</i> Thomas	36
<i>v.</i> Gillis <i>et al.</i>	44	<i>v.</i> Thompson	409
<i>v.</i> Godley	153	<i>v.</i> Tomkins	46
<i>v.</i> Golding	212	Van Ness <i>v.</i>	376
<i>v.</i> Grey Henry	675	<i>v.</i> Van Zandt	338
<i>v.</i> Green	520	<i>v.</i> Wade & Young	680
<i>v.</i> Griffith	366	<i>v.</i> Wells	43, 45
<i>v.</i> Haukey	65	<i>v.</i> Williams	438
<i>v.</i> Hedges	43	<i>v.</i> Winslow	47
<i>v.</i> Howland	508	<i>v.</i> Wood	164
<i>v.</i> Johnson	21	<i>v.</i> Wright	68, 296
		<i>v.</i> Yeaton	73

V.		Page			Page
Van Name, Triplett & Neale v.	332		White v. Cross		17
Van Ness, Beatty v.	67		Whetcroft v.		96
v. Heineke	259		Whiting, Adams v.		132
v. Rockville Turnp. v.	449		Whittemore v. Herbert		245
v. United States	376		Wilkinson, Short v.		22
Van Zandt, Davis v.	208		Williams v. Barrett		673
United States v.	338		v. Craven		60
Varden, Tayloe v.	37		v. Hopkins		98
Varnum, Burton v.	524		v. Threlkeld		307
v. Munro	425		United States v.		438
Powling v.	423		Williamson v. Bryan		407
Vasse v. Comegyss	564		Willis, O'Neale v.		108
Vane v. Smith	31		Park v.		83
Veitch & Co. v. Basye <i>et al.</i>	6		Wilson v. Berry		707
Veitch <i>et al.</i> , Peyton v.	123		Boyd v.		525
Venable, French v.	509		Heyer <i>et al.</i> v.		369
Violette v. Tyler	200		Heyer v.		633
Vowell v. Patton	312		Mills v.		216
W.			v. Porter		458
Wade & Young, United States v.	680		v. Turberville		27
Wager v. Lear	92		Washington v.		153
Wagner v. Watts	169		v. Young		33
Walker, Bank Metropolis v.	294, 361		William, Bank Alexandria v.		5
Corp. Washington v.	293		<i>Ex parte</i>		7
v. Johnson	203		Wingard, neg. Jos. Brown v.		300
Warfield, Nicholls v.	290, 429		Winslow, United States v.		47
Tayloe v.	248		Winter v. Simonton		585
Triplett v.	237		Wirt, Warfield v.		102
v. Wirt	102		Wise v. Bowen		239
Warner's bail, Bussard v.	111		Com. C. Alexandria v.		27
Washington v. Wilson	153		v. Resler		182
Waters v. Bussard	226		v. Ressler		199
Dixon v.	527		Wood, Arguelles v.		579
Wright v.	342		v. Forrest		303
Watson v. Bayley	67		United States v.		164
v. Dunlap	14		Woodward v. Hall		235
v. Hall	154		<i>et al.</i> , Smith v.		226
Watts, Wagner v.	169		& Yerby, Garrett v.		190
Way, Bank Washington v.	249		Graham v.		190
v. Selby	44		Wormsley v. Beedle		331
Weaver <i>et al.</i> , Newton v.	685		Worthington, Smallwood v.		431
Weightman v. Queen	172		Wright, Lenox v.		45
<i>et al.</i> , Zantzinger v.	478		United States v.	68,	296
Welch v. Mandeville	82		v. Waters		342
Welford v. Gilham	556		Y.		
Wells v. Hubbard	292		Yeaton, United States v.		73
United States v.	43, 45		Young, Bank Alexandria v.		52
Wetzel v. Bussard	252		Corp. Washington v.		632
Whann v. Hall	4		Deneale v.	200,	418
Wheaton <i>et al.</i> , Miller v.	41		Grundy v.		114
Wheelright, Bowie <i>et al.</i> v.	167		v. Mandeville		444
Whetcroft v. Burford	96		Miller v.		53
v. White	96		v. Moriarty		42
White, Bolton v.	426		v. Palmer		625
v. Corp. Washington	337		Wilson v.		33
			Young's case		453
			Zantzinger v. Weightman		478

CIRCUIT COURT OF THE UNITED STATES.

JUNE TERM, 1810, AT WASHINGTON.

THE UNITED STATES *v.* WILLIAM BATES.

The drawee of a forged draft is a competent witness to support the prosecution. To support an indictment for forgery, under the Maryland Statute 1799, c. 75, § 2, it is not necessary that the drawer should have a right to draw, or that the draft should purport to be by a person having a right to draw.

INDICTMENT under the Act of Assembly of Maryland 1799, c. 75, § 2, for forging a draft upon Gustavus Higden, with intent to defraud him.

Higden was offered as a witness on the part of the United States. He had paid the order.

Mr. Caldwell, Mr. Balch, and Mr. Sprigg, for the prisoner, cited *Peake*, L. E. 96, 97.

But the COURT, (THRUSTON, J., absent,) permitted the witness to be sworn and examined.

Verdict, guilty.

Motion in arrest of judgment, because it is not averred in the indictment that Arnol had a right to draw. 2 East, Cr. Law, 936; *Mitchell's case*, anno 1754, upon the Act of 7 Geo. 2, c. 22; the words of which are like those of the Act of Maryland, except that it has not these words, which are in the Maryland Act, "or draught for the payment of money, or delivery of goods, or other valuable articles."

The order, or draft, was in these words: "Washington City, Jan'y 12, 1810. Mr. Higden — Sir, you will please let the bearer, James Gray, have 3½ dollars' worth out of your store, and oblige, Sir, your most obed't serv't, William Arnol."

 Baugh v. Noland.

THE COURT (FITZHUGH, J., absent, but concurring,) was of opinion that the word "draught," in the Act of Assembly of Maryland, which was not in the English statute, made a difference; and that a draft might be made by a person who had no right to draw.

The sentence of the Court was twenty stripes.

CRANCH, C. J., said that it was the first case under this Act of Assembly which had come before the Court; and perhaps there was some ground to doubt whether the case was strictly within it, as explained by the English authorities. For these reasons, the Court inflicted a lighter punishment than they would otherwise have done.

NEGRO WALTER THOMAS v. ALEXANDER SCOTT.

Upon a petition for freedom, the defendant may appear and disclaim, without entering into the usual recognizance.

PETITION for freedom. The defendant, Scott, offered to appear and disclaim all right of property in the petitioner, at the time of service of the *subpoena* or any time since.

Mr. Law, for the petitioner, objected that he must enter into a recognizance before he can appear, and prayed for an attachment for not obeying the summons. The Act of Assembly 1796, c. 43, § 5, authorizes the Court to require such a recognizance. Mr. Law suggested that Mr. Scott, knowing that a petition was filed, sold and conveyed away the negro before service of the *subpoena*.

The COURT said that a man may appear, to disclaim, without entering into the recognizance to have the negro forthcoming, and refused the attachment.

BAUGH v. NOLAND.

Bail. Insolvent.

THE defendant had been discharged under the Insolvent Law of Maryland, in 1809, since the cause of action. The bail produced a copy of the record of discharge, and an *exoneretur* was allowed.

Queen v. Hepburn.

PRISCILLA QUEEN, a Negress, v. FRANCIS NEALE.

The declarations of an ancestor, while held as a slave, cannot be given in evidence. Declarations of deceased persons, that the ancestor was free, may be given in evidence, to show that the ancestor was in fact free, that is, not held in slavery.

PETITION for freedom. The declaration of the ancestor, while held as a slave, cannot be given in evidence, to prove that the ancestor came from England.

Per CURIAM, (THRUSTON, J., absent.) A witness, in his deposition, stated that he heard a deceased person say that the ancestor was free.

Mr. Law, for the defendant, contended that it was not evidence, because it was a mere opinion as to a question of right.

But the COURT (THRUSTON, J., absent,) permitted it to be read to the jury, as evidence that she was in fact free, that is, that she was not actually holden in slavery.

The COURT (FITZGHUGH, J., absent,) refused to instruct the jury that Jiam's declarations, that the ancestor was a free woman, and sold only for seven years, were incompetent to prove the petitioner's title to freedom; and instructed the jury that those declarations were admissible evidence, to prove that she was a free woman.



MIMA AND LOUISA QUEEN v. JOHN HEPBURN.

Alienage is not a cause of challenge of a juror. Challenge for favor is to be tried by the two first jurors who are sworn in the cause. A freeborn negro is a competent witness in a case of freedom.

PETITION for freedom.

The COURT directed twelve jurors to be drawn out of the box, and a list handed to each party.

The COURT (THRUSTON, J., absent,) rejected a challenge because a juror was an alien. It was stated to have been decided early in the existence of this Court, that alienage was no cause of challenge. Four jurors were challenged for cause, and put aside, until two were sworn, who tried whether the four stood indifferent.

The COURT admitted a freeborn black to give evidence. There were several bills of exception taken.

CRANCH, C. J., was absent during part of the trial.

Verdict for the defendant.

Judgment affirmed by the Supreme Court of the United States. 7 Cranch, 290.

WHANN v. HALL.

The testimony of the subscribing witness cannot be dispensed with, although he resides in Massachusetts.

THE plaintiff offered in evidence a receipt, to which there was a subscribing witness.

THE COURT refused to receive other evidence of the handwriting, although the plaintiff proved that the subscribing witness resided in Massachusetts, and had not been in the district since the last term.

BUT the Court said they would hear a motion for a new trial, if the verdict should be against the plaintiff.

Verdict for the plaintiff.

CIRCUIT COURT OF THE UNITED STATES.

JULY TERM, 1810, AT ALEXANDRIA.

BANK OF ALEXANDRIA v. W. WILSON.

After an indorser is fixed by proper demand and notice, the neglect of a trustee to sell property conveyed to him as security for the notes, until by depreciation it becomes inadequate security, will not exonerate the indorser.

A protest which does not state that the notary-public informed the indorser that payment had been demanded and refused by the maker of the note, is not evidence of sufficient notice to charge the indorser.

The day after the expiration of the three days of grace is soon enough to make the demand, and give notice; and it may be made by the notary's clerk who has possession of the note, with the plaintiff's assent.

The indorsement of the note is evidence of money had and received by the defendant for the plaintiff's use, although the note was indorsed by the defendant for the accommodation of the maker.

ASSUMPSIT against the indorser of A. & W. Ramsay's note.

Mr. E. J. Lee, for the defendant, contended that A. & W. Ramsay, having given a deed of trust to Ludwell Lee, with a power of sale in case of the note laying over for a year, and that the trustee not having sold the property until it depreciated, so as to become inadequate security, the defendant, the indorser, was discharged, although he had regular notice of non-payment.

But the COURT (*FITZHUGH, J.*, absent,) was of opinion that this was no defence.

The plaintiff then offered the protest, which stated that the notary-public had, on the 17th of October, 1805, (the three days grace expired with the 16th,) demanded payment from the maker, who did not pay, and from the indorser, who did not pay; but did not state that he informed the indorser that a demand had been made upon the maker, and payment refused.

The COURT (*THRUSTON, J.*, absent,) decided that the protest was not evidence of a sufficient notice. That the day after the expiration of the three days of grace was soon enough to make the demand and give notice. That a demand made by Alexander Moore, (a clerk of Cleon Moore, the notary-public,) he having possession of the note with a blank indorsement, with the assent of the plaintiffs, was by a person sufficiently authorized to make the demand and give notice. That the indorsement of the note was evidence of money had and received by the defendant for

Veitch & Company v. Basye & Metcalf.

the plaintiff's use, although the note was indorsed by the defendant for the accommodation of A. & W. Ramsay, who drew the money.

Verdict for the plaintiff.

Bills of exception were taken, but no writ of error prosecuted.

SNOWDEN v. MCGUIRE.

In an action of assault and battery, the questions, "Who printed the handbill?" and "Where was it printed?" are too general; not showing any agency of the defendant.

If the jury give only one cent damages, believing that it would carry costs, when it would not, they will not be permitted, after the verdict has been taken and they have been discharged from the cause, to go out again to alter their verdict.

ASSAULT AND BATTERY.

The Court refused to suffer the plaintiff's witness to be asked by the plaintiff's counsel where the handbill was printed, as being too general. The Court, for the same reason, refused to suffer the witness to be asked who printed it. (THRUSTON, J., absent.)

After the verdict had been taken for one cent damages, and the jury had been discharged from the cause and retired from the bar, but not out of the passage to the court-house, the foreman came into court, and informed the Court that they had understood that one cent damages would carry the costs; and that they supposed, as the assault was admitted, they were bound by law to give damages enough to carry the costs, but they now understood that one cent would not carry the costs.

Mr. Taylor, for the plaintiff, prayed the Court to suffer the jury to retire again and correct their verdict, and stated that such was the practice in Virginia.

Mr. Jones, for the defendant, objected.

The COURT (THRUSTON, J., absent,) refused.

VEITCH & COMPANY v. BASYE & METCALF.

The indorsement by the plaintiffs, and delivery of the note to a third person so indorsed, is *prima facie* evidence that it was transferred for value received, and throws the burden of proof on the plaintiffs to show that it has been retransferred, or was indorsed for collection, or that they had repaid the money.

DEBT by payee against the maker of a promissory note. Veitch & Company had indorsed it specially to Robert Cooper & Com-

Ex parte Wilson.

pany, which indorsement is erased, leaving the name of Veitch & Company.

There was no evidence that the note had ever been in the possession of Cooper & Company, nor that Veitch & Company had paid Cooper & Company the amount, nor that it has been retransferred. *Gorgerat v. McCarty*, 2 Dall. 144.

Mr. Swann, for the plaintiffs, offered evidence that it was indorsed to Cooper & Company for collection, and not for value received.

The COURT (THRUSTON, J., absent,) instructed the jury, that if they should be satisfied, by the evidence, that the note with the indorsement was delivered to Cooper & Company, the indorsement was *primâ facie* evidence that it was transferred to Cooper & Company for value received, and throw the burden of proof upon the plaintiffs, to show that it was either put into the hands of Cooper & Company for collection, or was retransferred, or that Veitch & Company had repaid to Cooper & Company the value received.

Ex parte W. WILSON.

The Court will not, on motion, discharge a prisoner for debt who has the benefit of the bounds, because the creditor refuses to pay the daily allowance.

MOTION by *Mr. E. J. Lee*, for W. Wilson, to order the marshal to discharge him from the prison-bounds, the creditor having failed to furnish him with his daily allowance, according to the Act of Congress 3d March, 1803, § 5, [2 Stat. at Large, 237.]

The allowance was demanded by the marshal on the 25th of June, 1810, and refused. The daily allowance for prisoners in execution for debt, was fixed by a general order of the Court, on the 13th of June, 1803.

The COURT refused to make such an order for the discharge of Mr. Wilson in this summary way, because if he has a right to depart the prison-bounds he is at liberty so to do; if he has not, the order of the Court would not justify the marshal in discharging him. See *Ex parte Wilson*, 6 Cranch, 52.

CIRCUIT COURT OF THE UNITED STATES.

JULY TERM, 1810, AT ALEXANDRIA.

ADJOURNED SESSION, FOURTH MONDAY OF OCTOBER.

MARSTELLER *v.* McCLEAN.

While the cause is depending in the Supreme Court of the United States, the Circuit Court will not permit the declaration, which was substantially defective, to be amended.

After a writ of error returned, the Court below can only permit clerical or judicial errors in the process or pleadings, to be amended.

MOTION by *Mr. E. J. Lee*, for the plaintiff, to amend the declaration, by inserting the time of the death of Hunter, the cause being now pending in the Supreme Court. *Mr. Lee* cited 3 Mod. 113; 1 Tidd, 662; 8 Co. 162; 3 T. R. 349; Ibid. 749; Doug. 114; Cowp. 841; 1 Str. 136; 1 Dall. 193; 2 Dall. 184; 1 H. Black. 643; 2 Johns. 184; [1 Stat. at Large, 73.]

Mr. C. Sims, contra. The amendment prayed is the insertion of a fact, (after judgment on the demurrer and a writ of error thereon,) which would defeat the demurrer. All the cases cited are of amendments of errors in the process or proceedings, by the clerk or of the courts; such as omissions in rendering the judgment upon a verdict, &c. There must be something to amend by. There is no instance of an amendment of a defective declaration, or plea, after error. The parties must be bound by their own pleadings. This is not an act of the Court or of the clerk.

Mr. E. J. Lee, in reply. This is not assigned as a special cause of demurrer. It is a general demurrer. The case in *Strange* is the act of the party; so in the case where the letter of attorney was amended.

The COURT (*THRUSTON, J.*, absent,) refused the amendment: it being a case where matter of substance is omitted in the declaration; not an error in process, or a clerical or judicial error.

 Catlett v. Cooke.

RUDD & BRUSH v. PAINE & MILLER.

If the defendant directs the garnishee to pay the debt due to the first attaching creditor, and he agrees to do so, a creditor who afterwards attaches, before the money is paid over, is not entitled to share it with the first attaching creditor.

CHANCERY ATTACHMENT. Steer attached first for three hundred dollars; Miller had seven hundred and seventy-seven dollars in his hands. Before Rudd & Brush attached, Paine, (the principal debtor,) came to Alexandria and directed the attachment of Steer to be settled by Miller, and a calculation was made of the amount, and Miller agreed to pay over the balance to Paine. Rudd & Brush afterwards attached.

Mr. Swann, for the plaintiffs, contended that Rudd & Brush had a right to participate with Steer in the amount intended to be paid to Steer, and that such is the practice in Virginia. The settlement between Miller and Paine does not affect the case. Miller was not bound by this verbal promise to pay the debt to Steer. He who asks equity must do equity.

Mr. Taylor, contra. This was the money of Steer, from the moment of the settlement between Paine and Miller; it was then appropriated, and agreed to by Mr. F. L. Lee, Steer's attorney, who only delayed the receipt of it till his return from a journey upon which he was then going. Steer might bring and support an action for money had and received.

The COURT (THRUSTON, J., absent.) Steer is to take the whole. A court of Equity will consider that as having been done, which ought to have been done.

 CATLETT v. LEONARD T. COOKE.

In Virginia a judgment on confession is equal to a release of errors, and this Court will not grant a writ of error *coram vobis* upon a suggestion of the death of the plaintiff, where the justice of the case does not seem to require it; nor will they quash a *fieri facias* issued in favor of the plaintiff's administrator upon a suggestion of the death of the administrator after the award of execution.

MOTION by *Mr. Swann*, for the defendant, for writ of error *coram vobis*, on the ground that the plaintiff died before judgment.

The judgment was confessed and there had been a forthcoming bond, and an execution thereon by the administrator of Catlett, and a writ of error thereupon to the Supreme Court

where the judgment was affirmed, and the cause remanded by mandate.

This COURT refused to grant the writ of error, (FITZHUGH, J., *contrà*.)

The confession of judgment by the Act of Assembly of Virginia of the 19th December, 1792, § 43, p. 113, is equal to a release of errors. It is not necessary for the justice of the case, that the writ should be granted.

Mr. Swann then moved to quash a *fieri facias* issued by Manning, the administrator of Catlett, because Manning died after the award of execution.

The COURT refused to quash it. (FITZHUGH, J., *contrà*.)

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1810, AT ALEXANDRIA.

ARELL'S REPRESENTATIVES *v.* MARSTELLER *et al.* Ex'rs of Arell.

In suits in equity against executors and administrators in Virginia, a lawyer's fee is not to be taxed.

BILL, against executors, to account, and pay over distributive share. Decree accordingly.

Mr. R. I. Taylor, moved that the attorney's fee should be charged in the bill of costs. The Act of Assembly of 19th of November, 1792, § 14, says, "except against executors and administrators." p. 98.

The COURT, (THRUSTON, J., absent,) directed that an attorney's fee should not be taxed.

THE UNITED STATES *v.* PALMER.

Witnesses cannot be sent to the grand jury on the part of the accused; nor can a grand juror be withdrawn after he is sworn, for a cause which existed before he was sworn.

Mr. E. J. Lee, stated that the witnesses were about to be sent to the grand jury on the part of the United States against one Palmer for perjury, and moved for leave to send up witnesses to the grand jury on the part of Palmer, and referred the Court to Burr's trial at Richmond. He moved also to withdraw from the grand jury the magistrate who committed Palmer. As to the right to challenge grand jurors, he cited Hawk. B. 2, c. 25, § 16, p. 215, 307, and c. 43, § 1, p. 412, third folio edition.

By the Virginia law, a magistrate of the examining court is excluded from the jury.

The COURT said that not being furnished with any precedent of sending up witnesses to the grand jury on the part of the accused, they refused the motion, and refused to withdraw a grand juror after he was sworn, for a cause which existed before he was sworn. See 4 Bl. Com. 302.

KNOX & CRAWFORD v. SUMMERS & THOMAS.

A debtor committed upon a *capias ad satisfaciendum* issued from a court of the United States cannot be discharged in Virginia, by two justices of the peace under the provisions of the law of the State.

THIS was an action of debt upon a prison-bonds bond given to D. M. Randolph, marshal of the district of Virginia, upon a *capias ad satisfaciendum* issued from the Circuit Court of the United States, for the district of Virginia. The marshal committed him to the custody of C. Turner, town-sergeant of Alexandria, on the 19th of April, 1800. The condition of the bond was that S. Stephens should remain in and not depart from the said prison rules and bounds as laid out &c., "until discharged by due course of law."

The defendant Thomas pleaded that Stephens was discharged by a warrant from two of the aldermen of Alexandria, directed to the town-sergeant, &c. General demurrer and rejoinder.

The COURT (THRUSTON, J., absent,) adjudged the plea to be bad, it not being a discharge by due course of law. The aldermen of Alexandria not having jurisdiction to discharge a prisoner committed in execution under a process from the Circuit Court of the United States. See Act of Congress of the 28th of May, 1796. [1 Stat. at Large, 482.]

WILLIAM HERBERT, JR., Assignee of John Potts under the Insolvent Law, v. FINLAY BANNATYNE & Co.

In a suit by the trustee of an insolvent debtor, a creditor of the insolvent is not a competent witness.

ON the trial of an issue from Chancery to ascertain for what sum the defendants could have sold a certain cargo of tobacco, Mr. E. J. Lee, for the complainant, offered W. Wilson as a witness.

Mr. Swann, for the defendants, objected that W. Wilson was a creditor of Potts, the insolvent, and was therefore a *cestui que trust*, and as such directly interested in augmenting the fund.

The COURT, (THRUSTON, J., absent,) decided that W. Wilson was not a competent witness.

UNITED STATES v. POLLY ROLLINSON.

On a prosecution for keeping a bawdy-house, the United States cannot give evidence of the general reputation of the house.

INDICTMENT for keeping a bawdy-house.

Mr. Jones, for the United States, asked the witness whether the house was generally reputed to be a house of ill-fame.

Mr. E. J. Lee objected.

The COURT (*THRUSTON, J.*, absent,) decided that the question was improper.

THOMAS BERRY, Petitioner for a Ferry from Alexandria, Hunting Creek Warehouse, to Addison's in Maryland.

This Court sitting in Alexandria, has only the powers of a County Court of Virginia in relation to ferries.

THE petitioner had a right to keep a ferry from Addison's in Maryland to Alexandria. See the Act of Virginia of 26th December, 1792, § 11, p. 227, and [2 Stat. at Large, 115.]

The COURT (*THRUSTON, J.*, absent,) refused.

1. Because they had no right to appropriate a public landing to the purposes of a ferry.

2. Because the old ferry from Hunting Creek to Addison's having been disused for more than two years and six months, had been discontinued under the Act of Virginia, and the Court had no right to grant a new ferry; having only the powers of a County Court of Virginia in this respect.

THE COMMON COUNCIL OF ALEXANDRIA v. BROCKETT.

When the issue is joined upon a matter of law, the court will not, at the prayer of either party instruct the jury upon the matter of law submitted to the jury by the pleadings.

DEBT for the penalty of two hundred dollars under a by-law against burning oyster-shells in Alexandria.

The defendant pleaded that the penalty of the by-law was not a reasonable penalty, upon which the plaintiff took issue.

Upon this issue the plaintiff moved the Court to instruct the

jury that if they should be satisfied that in the year 1803, (the year the by-law was passed) the yellow fever prevailed in the town and was generally supposed to have been caused by burning oyster-shells, then the penalty was reasonable.

The COURT (THRUSTON, J., absent,) refused to give any instruction to the jury upon the subject, the parties having by their pleadings put the reasonableness of the penalty in issue to the jury. If the party offers an issue as to matter of law, the other party may demur; if he joins issue he cannot afterwards submit the matter of law to the court.

WATSON v. ELIZA DUNLAP, a Widow.

The promise of a *feme covert* is void, and her subsequent promise when sole, without a new consideration, is also void.

A promise in writing without consideration is void; but the burden of want of consideration is on the defendant.

The plaintiff cannot give evidence of a consideration different from that alleged in the declaration.

ASSUMPSIT, to pay for money advanced by the plaintiff to the defendant's son by her first husband.

Mr. J. D. Simms, for the defendant prayed the court to instruct the jury that the first assumpsit being made while under coverture was void, (1 Strange, 94,) and that the subsequent assumpsit while sole, was void for want of consideration.

Mr. Youngs, for the plaintiff, contended that the promise being in writing, it was not necessary that there should be a consideration. 3 Call, 114.

The Court cannot alter the words of a statute, if they are positive; if not ambiguous, there is no room for construction. The statute of frauds only requires the promise to be in writing, not the whole agreement. *Violett v. Patton*, 5 Cranch, 142.

The Court was of opinion, 1st, that there must be a consideration, although the promise be in writing. *Rann v. Hughes*, 7 T. R. 350; *Wain v. Warlters*, 5 East, 11. But the burden of proof is on the defendant to show the nature of the consideration, or that there was none. 2d, That the advance of money to her son while she was covert, did not create such a moral obligation upon the defendant as is a sufficient consideration to support her actual assumpsit in writing.

The COURT also refused to permit evidence of a consideration different from that assigned in the declaration. *Non pros.*

Sheehy v. Mandeville.

BANK OF UNITED STATES v. JOHN ROBERTS.

The plaintiff's counsel may fill up the blank indorsement, at the trial, although the defendant indorsed the note for the accommodation of the maker.

ASSUMPSIT against the indorser of Elisha Janney's promissory note.

Mr. Swann, for the plaintiff, was about to fill up the blank indorsement, "Pay the contents to the President, Directors and Company of the Bank of the United States, for value received."

Mr. E. J. Lee, for the defendant, objected that the defendant was an accommodation indorser, and never received value.

Mr. Swann and *Mr. Caldwell*, *contrà*. The words "credit the drawer" are equivalent to a check, and show that the money would have gone to the credit of the defendant.

The COURT (THRUSTON, J., absent,) suffered the indorsement so to be filled up.

SHEEHY v. MANDEVILLE.

The Court may, in its discretion, allow the general issue to be pleaded, after judgment upon demurrer has been awarded by the Supreme Court of the United States, and a mandate to this court to enter the judgment and award a writ of inquiry.

THE plaintiff being about to execute his writ of inquiry, *Mr. C. Lee*, for the defendant, moved for leave to plead the general issue.

Mr. E. J. Lee and *Mr. Jones*, for the plaintiff, *contrà*. The mandate from the Supreme Court, (see 6 Cranch. 253,) is peremptory to render judgment for the plaintiff on the 1st count, and to award a writ of inquiry. But if it be within the discretion of the Court, they will not permit the defendant now to amend his pleadings, as the plaintiff's principal witness is dead.

Mr. Youngs, for the defendant, cited 3 Bl. Com. 407; 1 Com. Dig. 467; 2 Strange, 787; 5 T. R. 112, 118; 7 T. R. 132, 133; 2 Dall. 184; 1 Wash. 318.

The COURT refused to permit the defendant now to plead the general issue: because he might have availed himself of the special matter, which he has already pleaded, upon the general issue; and because the plaintiff's witness has died since the former judgment.

The COURT said, however, that they had little doubt as to their power to allow the plea; but it was a matter of discretion.

The residue of this case as it appeared upon the writ of inquiry is reported in 7 Cranch, 208.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1810, AT WASHINGTON.

BARTLEMAN *v.* SMARR.

Affidavit to hold to bail.

Mr. Law, for the defendant, moved to appear without bail. There was an affidavit filed, charging the defendant in the following manner: "1809, Oct. 5. To goods per bill, \$91.89," with an affidavit "that the above account is just and true."

The COURT was of opinion that it was not a sufficient affidavit to hold the defendant to bail.

NEALE *v.* MINIFIE.

A justice of the peace is not liable in an action of false imprisonment under an illegal warrant issued by him, unless it be issued maliciously.

THIS was a motion for a new trial on the ground of misdirection of the jury, by the Court at the last term, in instructing the jury that it was not necessary for the plaintiff to prove malice, in an action against the defendant, a justice of the peace, for false imprisonment, the justice having committed the plaintiff for profane swearing, and making a disturbance in the market.

The COURT (*nem. con.*) granted the new trial, being satisfied that a justice of the peace is not liable in an action for false imprisonment, for issuing an illegal warrant on which the plaintiff is imprisoned; unless it be done maliciously.

NEWMAN *v.* DAVIS.

Trespass *vi et armis*, will lie for assaulting and shooting the plaintiff's slave, without a *per quod servitium amisit*.

TRESPASS, *vi et armis*, for assaulting and shooting the plaintiff's slave.

 Cooke v. O'Brien.

Motion in arrest of judgment, that trespass *vi et armis* does not lie. It ought to be a special action upon the case; the damages being consequential only.

But the COURT (THRUSTON, J., doubting,) overruled the motion.

 WHITE v. CROSS.

Upon the issue of "no rent arrear," the plaintiff in replevin will not be permitted to show that the defendant "had nothing in the tenements."

An assignment by the lessor, during the term, without attornment, does not prevent the lessor from distraining.

In replevin for goods distrained for rent, the defendant cannot give evidence of the value of the use and occupation.

REPLEVIN. Avowry for rent,—plea, no rent arrear,—and issue.

THE COURT (THRUSTON, J., absent,) refused to permit the tenant to give in evidence, a deed in fee from Cross to Prout, made within the term, without attornment, to show that Cross had no right to distrain; the only issue being "no rent arrear," which admits the demise, and precludes the tenant from showing that the defendant had nothing in the tenements. The Court also refused to permit the defendant, Cross, to give evidence of the value of the use and occupation of the house; as he could only distrain upon a special agreement for a sum certain.

 COOKE v. O'BRIEN.

In slander, the defendant may, in mitigation of damages, give evidence of the grounds of his belief of the truth of the charge which he has made.

SLANDER. The defendant said the plaintiff was a perjured villain.

The defendant, in mitigation of damages on the plea of not guilty, offered to give evidence of the grounds of his suspicion and belief that the plaintiff had committed perjury.

Mr. Jones, for the plaintiff, objected, but the COURT (*nem. con.*) permitted the evidence to be given. See Peake, L. E. 287, 2d Am. Ed.

Mr. Key and Mr. Law for the defendant.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1810, AT WASHINGTON.

ADJOURNED COURT, APRIL, 1811.

BOSWELL *v.* THE CORPORATION OF WASHINGTON.

The receipt of the dog-tax, after suit brought, is a waiver of the penalty.

APPEAL from the judgment of a justice of the peace, rendered for the penalty of ten dollars for non-payment of a dog-tax, on the 1st of January, according to the by-law of November 4, 1807, § 2.

It appeared in evidence, that the tax had been received by the proper officer after the suit brought.

The COURT (*nem. con.*) decided that the receipt of the tax by the treasurer was a waiver of the penalty; and said, that upon payment of the costs before the justice, the judgment should be reversed; the parties to pay their own costs on the appeal.

MUIR *v.* JENKINS.

The indorsee of a promissory note, not payable to order, but expressed to be "negotiable at the Bank of Discount and Deposit," may maintain an action upon it in his own name, against the maker.

JENKINS made a note for \$250, payable to Stebbins, without the words "or order," but made "negotiable at the Bank of Discount and Deposit." Stebbins indorsed it to the plaintiff. There was a verdict for the plaintiff, and a motion in arrest of judgment, by *Mr. Caldwell* and *Mr. Porter*, the defendant's counsel.

Mr. Jones, for the plaintiff, contended that a promissory note, without the words "or order," is a note within the statute of Anne, so as to enable the payee to maintain an action thereon under the statute. That if it is a note within the statute for one purpose, it is so for all other purposes; and that therefore an indorsee of a note, not payable to order, may maintain an action in his own name under the statute. *Nicholson v. Sedgwick*, 1 Lord Raym. 180; *Burchen v. Slocock*, 2 Lord Raym. 1545;

Friend v. Corporation of Washington.

Smith v. Kendall, 6 T. R. 123; *Chitty on Bills*, 48, 108; *Gibson v. Minet*, 1 H. Bl. 569, and 3 T. R. 481; *Tatlock v. Harris*, 3 T. R. 174.

Mr. Caldwell and *Mr. Porter*, for the defendant, cited *Carlos v. Fancourt*, 5 T. R. 482; *Hodges v. Steward*, 1 Salk. 125; *Hill v. Lewis*, 1 Salk. 133; *Nicholson v. Sedgwick*, 1 Lord Raym. 180; *Chitty*, 48; *Imp. Mod. Pleader*, 390; and contended that the words "negotiable at the Bank of Discount and Deposit at Washington," only confine the negotiability of the note to that place, or make it payable out of a particular fund; that promissory notes are put upon the same footing as inland bills; and that an inland bill, not payable to order, is not negotiable. They cited also, *Smith v. Kendall*, 6 T. R. 123; *Banbury v. Lissett*, 2 Strange, 1211; *Chamberlyn v. Delarive*, 2 Wils. 353; *Dawkes v. De Lorane*, 3 Wils. 207; *Chitty*, 174; *Evans on Bills*, 139; *Kyd*, 34, 35, 63, 96, 97; *Esp.* 26.

Mr. Morsell, for the plaintiff, in reply, cited *Roberts v. Peake*, 1 Burr. 323, where the note was not payable to order, and was only payable upon an uncertain contingency; and the Court decided that it was not a negotiable note, because the contingency was uncertain, without noticing the objection that it was not payable to order.

The COURT (CRANCH, C. J., *contra*.) overruled the motion in arrest, and rendered judgment for the plaintiff, on the ground that it was the intention of the defendant to make a negotiable instrument.

FRIEND v. CORPORATION OF WASHINGTON.

Assize of bread.

THIS was an appeal from the judgment of a justice of the peace for a penalty incurred under the 5th section of the by-law of the 17th of April, 1806, for offering for sale bread of insufficient weight. By the 4th section, it was the duty of the mayor, or register, to ascertain and publish in the last week of every month the cash price of superfine flour; and the price so published was to be the standard by which the weight of bread was to be regulated for the month succeeding, according to the rule prescribed in the 3d section. This price not having been ascertained and published in the last week of the month preceding the supposed offence, the Court reversed the judgment.

Bank of United States v. McLaughlin's Ad'mr.

REINTZEL v. MORGAN.

The payee of a promissory note, who has passed it away, and been obliged by his indorsement, to take it up, may recover the money from the maker, upon a special count.

THE jury found a general verdict. The defendant's counsel, *Mr. Key*, moved in arrest of judgment, because, as he supposed, one of the counts was bad.

The count was special, and stated that Morgan made his note to Reintzel or order, who indorsed it to the Bank of the United States. That the note was duly protested for non-payment, and that Reintzel was, by his indorsement and consequent liability, obliged to pay it, and did pay it, &c. All this was averred in the most formal manner, with all the circumstances of time and place, &c.

THE COURT (*FITZHUGH, J., contra*,) overruled the motion, and rendered judgment for the plaintiff, which was affirmed by the Supreme Court of the United States, 7 Cranch, 273.

THE PRESIDENT, DIRECTORS, & CO. OF THE BANK OF THE UNITED STATES v. McLAUGHLIN'S ADMINISTRATOR.

The expiration of the charter of the Bank of the United States, on the 4th of March, 1811, abated all suits then pending in the name of the President, Directors, and Company of that Bank.

Mr. F. S. Key, for the defendant, pleaded in abatement, that since the last continuance, the charter of the Bank of the United States had expired by the limitation contained in the third section.

To this plea, the plaintiffs demurred.

This action was brought on the 23d December, 1809. The charter expired on the 4th of March, 1811, previous to which time the bank had made a general assignment of all its effects to David Lenox and others, in trust, for the purpose of closing its concerns; and this suit had, by the clerk of this Court, been entered for the use of the trustees before the expiration of the charter.

Mr. Caldwell, for the plaintiffs, contended that the corporation was not entirely extinct, as by the 10th section of the charter, its notes were still receivable in all payments to the United States.

THE COURT, however, (*nem. con.*) was of opinion that the expiration of the charter abated the suit, there being no legal plaintiff.

Judgment for the defendant.

CIRCUIT COURT OF THE UNITED STATES.

JUNE TERM, 1811, AT WASHINGTON.

UNITED STATES *v.* JOHNSON.

A storehouse, not within the curtilage, but in which the clerk of the owner usually sleeps, is, in law, the mansion-house of the owner; and burglary may be committed therein.

THIS was an indictment for a burglary by breaking and entering the dwelling-house of Mr. Cassin.

The building which the prisoner entered was a storehouse on a lot contiguous to the house in which Mr. Cassin lived; but not in the curtilage; his storekeeper, however, usually slept in it at night.

Mr. Morsell and *Mr. Van Horne*, for the prisoner, contended that this was not a dwelling-house; but if it was, it was the dwelling-house of the storekeeper, and should have been so charged in the indictment.

THE COURT (CRANCH, C. J., absent,) said that this was a dwelling house, where a person sleeps at night, and is liable to be put in fear. The storekeeper was the servant or agent of Mr. Cassin. A person may have two dwelling-houses, in either of which burglary may be committed. 1 Hale, H. P. C. 556; Cr. Cir. Comp. 207, 480. The sleeping in a house at night fixes its character, whether or not it be a dwelling-house; for a house which is only occupied and resided in during the day, is not considered a dwelling-house. 1 Hawk. ch. 38, § 10 to § 20. On the contrary, if a person takes an inn of court, or a room for the purpose of lodging, burglary may be committed therein.

Verdict not guilty.

BELL *v.* HOGAN.

If a colored man was born a slave, his being permitted to go at large without restraint, and to act as a free man, is no evidence of his being free.

If the plaintiff's freedom was not so notorious that the defendant might be presumed to know it, the defendant is not liable to damages for taking up the plaintiff as a runaway; he being a colored man and, *primâ facie*, a slave.

TRESPASS. Assault, battery, and false imprisonment.

The case was, that the defendant took up the plaintiff as a runaway, and carried him before a justice of the peace.

The COURT (CRANCH, C. J., absent,) on the prayer of the defendant, instructed the jury, that if they believed, from the evidence that the plaintiff was born a slave, his being permitted to go at large without restraint, and to act as a free man, was no evidence of his being free. And that if the plaintiff had recently come into this county, and was not known to the defendant to be free, and his freedom was not so notorious that the defendant might be presumed to know it, then the defendant is not liable in this action, if he used no unnecessary violence, and took up the plaintiff with a *bona fide* intention of ascertaining whether he was a slave or not.

FITZTHUGH, J., in a note to this case, says "The ground of those instructions was, that the plaintiff's color was *prima facie* evidence of his being a slave, and justified his being taken up under a suspicion of his being a runaway. In any question respecting a negro's freedom, it is incumbent upon the negro to show that he is free; and this must be by producing the record of his emancipation. If he had been proved to have been born a slave, he is presumed to be always a slave, and the burden of proving his emancipation devolves on him."

SHORT v. WILKINSON.

Nul debet is not a good plea to an action of debt, in the District of Columbia, brought upon a judgment of a State court in Kentucky; but the defendant may, with the leave of the Court, withdraw it, and plead *nul tiel record*, on payment of the costs of the term, and a continuance of the cause until the next term, if the plaintiff should desire it.

DEBT on a judgment obtained in a State court in Kentucky. The defendant pleaded *nil debet*, and payment. When the cause was called for trial, *Mr. Jones* and *Mr. Law*, for the defendant, moved to be allowed to strike out the plea of *nil debet*, and to substitute the plea of *nul tiel record*.

Mr. Key, for the plaintiff, objected that it was now too late, and that *nul tiel record* is an improper plea. If the plaintiff will consent to take his judgment on the plea of *nil debet*, it is not for the defendant to object that it is an immaterial plea.

Mr. Jones, in reply. The defendant is as much interested in seeing that the pleadings are regular, as the plaintiff; because a judgment in his favor upon an immaterial issue, will not protect him against a subsequent suit on the same cause of action.

By the COURT. (CRANCH, C. J., absent.) The amendment is allowed on paying the costs of the term, and on the plaintiff's being allowed a continuance if he wishes it.

They said it had been decided, on demurrer, during this term, that a judgment of a State court is a domestic judgment, and that *nil debet* is an improper plea to an action of debt upon such a judgment. So, in *Skyren v. Lindo*, in Alexandria, where the plaintiff brought an action upon the case on a judgment obtained in Virginia, and the defendant was held to bail on affidavit, the Court suffered him to appear without special bail; and decided, on demurrer, that the action should have been debt, and not case. By the Constitution of the United States, "Full faith and credit shall be given by each State to the public acts, records, and judicial proceedings of every other State," and by the Act of Congress of 26th May, 1790, those acts, when authenticated in the manner therein prescribed, shall have the same faith and credit as they would have had in the court whence the record is taken. The exemplification of the record on which this suit is founded, will have the same effect as if this suit had been in a county in Kentucky, and no other authentication will be required here than there. If, then, *nil debet* would be an improper plea there, it will be equally so here; and from a parity of reasoning, if *nul tiel record* would not only be an admissible plea, but the best adapted to try the question, on a suit in Kentucky, it will be so here.

DAVIS v. FORREST.

A record of a recovery of freedom by the female ancestor of the petitioner, on the ground of her having been born free, may be given in evidence to support the petitioner's title, although the present defendant was not a party to that record; and the depositions of deceased witnesses, contained in that record, may be read as hearsay, to prove pedigree.

A party producing a record in evidence is not obliged to read the whole of it; but the opposite party may read it.

Particular acts of turpitude cannot be given in evidence to discredit a witness. The question is only as to his general character for veracity. But see *Wood v. Davis*, 7 Cranch, 271; *Henry v. Ball*, 1 Wheat. 1; *Davis v. Wood*, 1 Wheat. 6; and *Mima Queen v. Hepburn*, 7 Cranch, 290.

PETITION FOR FREEDOM.

Mr. E. J. Lee, for the petitioner, offered the record of a recovery in a suit for freedom by *Rosamond Bentley v. A. Addison*, which the COURT (CRANCH, C. J., absent,) admitted as evidence, to prove the freedom of Mary Davis, the ancestor of the present petitioner, and of the said Rosamond Bentley, who was the petitioner's aunt.

Davis v. Forrest.

Mr. Lee, in support of his motion, contended that hearsay evidence would be admissible, and, if so, *à fortiori* a record which, although between other parties, goes to the same facts. *Peake*, L. E. 8, 9 ; *Taylor v. Cole*, cited in 7 T. R. note (a) ; and *Pegram v. Isabell*, 2 Hen. & Munf. 193.

The Court also suffered the depositions of witnesses, now dead, which had been taken in that suit and made part of that record, to be read in evidence as hearsay. The Court also suffered the defendant to read such parts only of a record which he produced as he thought proper, and said it was competent for the counsel of the petitioner to read the residue. The Court also admitted in evidence the record of a recovery by the petitioner's sister, Susan Davis, of her freedom, on the ground of having been free-born.

Verdict for the defendant.

CIRCUIT COURT OF THE UNITED STATES.

JULY TERM, 1811, AT ALEXANDRIA.

UNITED STATES v. BASCADORE.

Cheating at cards. Fine and imprisonment.

INDICTMENT for cheating at cards. Verdict, guilty. The jury assessed the fine at five times the value of the loss, viz., 37½ dollars.

The COURT added six months' imprisonment, under the Acts of Assembly of Virginia of the 8th of December, 1792, § 9, and the 1st of December, 1789, § 2, pp. 47, 176.

FAIRFAX v. FAIRFAX'S EXECUTOR.

Upon the issue of *plene administravit*, a surety in the administration-bond is a competent witness for the defendant.

If the defendant offer evidence of the payment of the testator's bond, he need not prove its execution by the subscribing witnesses.

The executor may pay a debt barred by the act of limitations.

Bills purchased and remitted to pay a foreign debt may be given in evidence as payments, if purchased and remitted before the writ was served on the defendant.

ASSUMPSIT. Plea, *plene administravit*.

H. Gunnell, one of the sureties in the administration-bond, was admitted as a witness for the defendant, to prove *plene administravit*. (THRUSTON, J., absent, and FITZHUGH, J., doubting.) CRANCH, C. J., thought the interest too remote to disqualify the witness. The defendant offered to prove that he had paid a bond of the testator.

Dean v. Tucker.

Mr. E. J. Lee, for the plaintiff, required proof by the subscribing witnesses that the bond was signed, sealed, and delivered by the testator, and cited *Saunderson v. Nicholle*, 1 Show. 81.

The COURT (THRUSTON, J., absent,) decided that it was not necessary to produce more than *prima facie* evidence of the debt. If fraud be alleged, it ought to be proved. The Court also decided that an executor might pay a debt barred by the act of limitations.

The action was brought on the 18th of May, 1804. Certain debts were paid by the defendant's agent in England, in July and October, 1804. The bills to pay those debts were purchased by the defendant on the day of the date of the writ, (18th May, 1804.)

The COURT left it to the jury to decide whether the bills were purchased before the service of the writ on the defendant, and directed them that if the bills were purchased and remitted for the purpose of payment before the service of the writ, it was a good payment on *plene administravit*.

DEAN v. TUCKER.

The members of an insurance association are bound by the act of the majority, unless there be some restriction in the articles of association.

THIS was an action for money had and received.

Dean was entitled to a dividend on premiums received by the Insurance Association, of which Tucker was chairman, and the plaintiff a member. The association had voted to advance to James Wilson a sum of money, on account of a claim for a loss. The advance was made, and Wilson's note taken to refund in case the loss was not finally established. Dean objected to the advance. The broker of the association (Groverman) applied Dean's dividend to his proportion of the advance to Wilson.

Mr. E. J. Lee, for the plaintiff.

Mr. C. Simms, for the defendant.

The COURT (*nem. con.*) instructed the jury, at the prayer of the defendant's counsel, that if they should be satisfied, by the evidence, that there was no restriction in the articles of association, (which were lost) then the members of the association were bound by the act of the majority, as to all matters within the purview of the association; and that the payment, or advance of money, on account of losses, was a matter within the purview of the association; and that the plaintiff, being a member, could not recover in this action.

WILSON v. TURBERVILLE'S EXECUTOR.

After interlocutory decree, and an issue ordered, the Court will not permit the defendant to plead the statute of limitations, and to file an answer.

AN issue from Chancery being called up for trial, in this cause, *Mr. Swann*, for the plaintiff, moved for leave to plead the statute of limitations, and to file an answer.

Mr. E. J. Lee, for the plaintiff, objected that it was now too late, after interlocutory decree; that the answer offered was not a full and fair answer; and that by his will the testator had ordered all his just debts to be paid; which took the case out of the statute.

The COURT, (THRUSTON, J., absent,) after consideration, overruled the motion.

 THE COMMON COUNCIL OF ALEXANDRIA v. JOHN WISE.

The lots lying west of West street, in Alexandria, are liable to be taxed like other lots in the town.

THIS was a motion for judgment for taxes on a range of lots lying on the west side of West street, in Alexandria. The question was whether the jurisdiction of the corporation extended over those lots.

The Act of Assembly of Virginia of the 10th of December, 1796, recites that, "Whereas several additions of lots, contiguous to the town of Alexandria, have been laid off by the proprietors of the land in lots of half an acre each, extending to the north, to a range of lots on the north side of a street called Montgomery; upon the south to the line of the District of Columbia; upon the west to a range of lots on the west side of West street, and on the east to the River Potomac; that many of the lots in these additions have already been built upon, and many more will soon be improved:—And whereas it has been represented to the General Assembly that the inhabitants residing on the said lots are not subject to the regulations made and established for the orderly government of the town, and for the preservation of the health of the inhabitants by the prevention and removal of nuisances, upon which their prosperity and well-being does very much depend;—Section 1. Be it therefore enacted, that each and every lot and part of a lot within the aforesaid limits on which at this time is built a dwelling-house of at least sixteen feet square, or equal thereto in size, with a brick or

stone chimney, and that each and every lot within said limits which shall hereafter be built upon, shall be incorporated with the said town of Alexandria, and be considered as part thereof."

The 2d section provides for the removal of nuisances from any lots, within those limits, which were not incorporated with the town; and by a subsequent act the unimproved lots within the same limits are "incorporated with," and to be "considered as a part of, the said town of Alexandria, and subject to the same regulations as the other parts thereof."

Mr. E. J. Lee, for the defendant, contended, that the lots were to be considered as contiguous to the town, not in the town; and that they were subject only to the regulations respecting nuisances; and not liable to taxes.

The COURT, however, (FITZHUGH, J., absent,) was of opinion that the jurisdiction extended over the range of lots west of West street; and that by the Acts of Virginia, those lots were incorporated with, "and to be considered as part of, the town, and subject to the same regulations as the other parts thereof."

See the Act of Virginia, of 1785, 1786, 1796.

CIRCUIT COURT OF THE UNITED STATES.

OCTOBER SESSION, 1811, AT WASHINGTON.

HELLEN v. BEATTY'S ADMINISTRATORS.

Under the Act of Maryland, 1798, c. 101, ch. 8, § 15, the court, and not the jury is to ascertain whether the defendants paid away all the assets before notice of the plaintiff's claim.

DEBT upon a bond. The defendants pleaded that they first had notice of the plaintiff's claim on the first of November, 1809, when they had fully administered ; and laid a rule on the plaintiff to reply.

Mr. Morsell, for the plaintiff, contended that under the Maryland Act of 1798, c. 101, ch. 8, § 7, he was not bound to reply.

Mr. F. S. Key, for the defendants. It is not a plea respecting assets, but respecting notice ; and the want of notice before paying away all the assets, is an absolute bar to the action under the 15th section of the same chapter of the act.

Mr. Morsell, contra. The only question is whether the plaintiff is bound to reply to the plea of *plene administravit*. The object of the act of assembly is to prevent the administrator from being liable out of his own estate ; not to prevent judgment for assets *quando acciderint*. The act intends only to discharge the administrator from those assets which he has paid away without notice. All the assets, means all in hand, or of which he had possession. The debt is not discharged.

The COURT, (FITZHUGH, J., absent,) was of opinion, under the 15th section of chapter 8, that no judgment could be rendered, as the defendants showed a *plene administravit*, and that the Court, not the jury, is to ascertain whether the defendants paid away all the assets before notice.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1811, AT ALEXANDRIA.

UNITED STATES *v.* CLEMENTS.

A recognizance in a case of bastardy, cannot be taken by a justice of the peace, in Virginia, unless upon the application of the overseers of the poor.

THIS was a recognizance, taken by a justice of the peace in Alexandria, in a case of bastardy.

Mr. E. J. Lee, for the defendant, moved the Court to quash it because it was not taken at the request of the overseers of the poor, according to the Act of Assembly of Virginia, of 26th December, 1792, § 13, p. 183.

The COURT, (THRUSTON, J., absent,) ordered the recognizance to be discharged, unless the overseers of the poor should appear at this term and show cause to the contrary.

UNITED STATES *v.* BASCADORE.

The confession of a prisoner, taken upon oath, cannot be used against him upon his trial.

INDICTMENT for burglary.

The Attorney for the United States, offered to prove by *Mr. Faw*, a justice of the peace, that the prisoner sent for him to come to the gaol, where the prisoner confessed the fact and named his associates. This confession was taken upon oath, as it charged the accomplices.

The COURT, (*nem. con.*) upon the authority of McNally, p. 47, Rule 12, rejected the testimony, no goods having been found in consequence of the confession. The statute of Phillip and Mary does not say whether the confession should be upon oath or not. From the silence of the act in that respect the judges have drawn the inference that the confession is not to be upon oath; and it is said that policy forbids the using of such declarations against the prisoner.

JANNEY v. JONATHAN MANDEVILLE'S ADMINISTRATOR.

If the defendant die after office judgment and writ of inquiry awarded, his administrator cannot plead *plene administravit*; nor any other plea which the original defendant himself could not have pleaded.

A WRIT OF INQUIRY had been awarded in the lifetime of the defendant's intestate.

The defendant offered to plead *plene administravit*; but the Court refused to receive the plea, on the authority of *McKnight v. Craig's Administrator*, decided at the last term of the Supreme Court of the United States, in February, 1811, 6 Cranch, 183, where it was ruled that after an office judgment in the lifetime of the intestate, the defendant cannot plead any plea which the intestate could not have pleaded.

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VASSE v. SMITH.

The magistrate who, in taking a deposition under the Act of Congress, reduces to writing the testimony of the witness, need not state that it was written in the presence of the witness; but if reduced to writing by the witness himself, it must be done in the presence of the magistrate; and that fact may be proved *aliunde*. The authority of the magistrate need not be proved otherwise than by his own certificate.

Mr. Taylor, for the defendant, objected to a deposition taken under the Act of Congress on the part of the plaintiff, that the judge who took it did not certify that the testimony which was reduced to writing by him, was written in the presence of the witness.

THE COURT (THRUSTON, J., absent,) overruled the objection.

The defendant's counsel also objected that it did not appear, otherwise than by his own certificate, that *Mr. Nevison*, who took the deposition, was Recorder of Norfolk, and a judge of a court, &c.

THE COURT overruled this objection also.

Mr. E. J. Lee and *Mr. C. Lee*, for the plaintiff, objected to a deposition taken on the part of the defendant, that the magistrate did not certify, that the testimony of the witness was reduced to writing by the witness in the presence of the magistrate, although it was certified to have been reduced to writing by the witness and subscribed by him in the presence of the magistrate.

THE COURT, upon reading the certificate, thought the inference strong that it was written in presence of the magistrate, but permitted the magistrate to be sworn to prove the fact.

For the other points decided in this cause, see 6 Cranch, 226, in the Supreme Court of the United States.

 Johnston v. Chapman & Alexander.

PILES v. PLUM & SWANN.

In a joint action of trespass against two defendants, if they plead severally they may be mutually examined as witnesses for each other. *Quære.*

TRESPASS for beating a mare, and breaking her leg with an axe, so that she died.

The defendants had been taken at different times and had pleaded severally.

Mr. Taylor, and *Mr. E. J. Lee*, for the defendants, offered to examine the defendant Swann, as a witness for Plum, the other defendant.

The plaintiff's counsel, *Mr. Swann*, objected; and contended that there could be but one judgment although the verdicts might be several.

The COURT, with some hesitation (FITZHUGH, J., absent,) permitted the defendant Swann, to be examined. See *United States v. Pawling et al.* in the Supreme Court of the United States, 4 Cranch, 221; *Harper v. Smith*, in this Court at July term, 1808, (1 Cranch, C. C. 495,) and the *United States v. Hunter et al.* at November term, 1807, (1 Cranch, C. C. 446,) and the *United States v. Abbot*, in the District Court, (not reported.) But see below, *Johnston v. Chapman & Alexander*.

 JOHNSTON v. CHAPMAN & ALEXANDER.

In trespass one defendant cannot be a witness for the other, in a joint action, although they plead severally.

ASSAULT AND BATTERY. The defendants severed in pleading, having been taken at different times.

Mr. Swann, for the defendant, offered to examine the defendant, Alexander, as a witness for Chapman, on the authority of the case of *Piles v. Plum & Swann*, decided yesterday.

But the COURT (THRUSTON, J., absent,) refused, saying that the case decided yesterday is not to be considered as authority; the Court having since looked into the authorities cited in *Lofft's Gilbert*, 250.

MOTT v. SMITH.

In an action for a malicious attachment, the official return of the attachment is not conclusive, but may be contradicted by parol.

CASE, for a malicious attachment for rent, not due, under the Act of Virginia, of 29th November, 1792, § 8, p. 154; the tenant being about to remove.

Mr. Taylor, for the defendant, moved the Court to instruct the jury that the attachment was not laid, the return of the officer being "not executed by order of the plaintiff," (the present defendant.)

The COURT (CRANCH, C. J., *contrà*,) decided that the return was not conclusive; but that the plaintiff (although he had produced the writ of attachment, and its return, in evidence,) might contradict the return, by parol.

GULLAT & SCOTT v. TUCKER.

A copartnership is not chargeable for goods sold to one of the partners for his separate use, although he ordered them to be charged to the firm, if the vendor knew, at the time of sale, that they were for the sole use of that partner.

ASSUMPSIT, for balance of account. The defendant had charged the firm of G. & S., who were bakers, with groceries delivered to G. and originally charged to G. in the books of Tucker, but were got by G. and ordered by him to be charged to the partnership account.

The COURT instructed the jury that, if they believed from the evidence that Tucker, at the time he sold and delivered the groceries to Gullat, knew that they were for his separate use, he had no right to charge them to the firm without the assent of Scott. It would be a collusion. *Bond v. Gibson & Jephson*, Camp. N. P. Rep. 185.

WILSON'S ADMINISTRATOR v. ROBERT YOUNG.

Parol evidence cannot be given of a transfer in writing, without proof of the loss of the writing, or otherwise accounting for its non-production.

ASSUMPSIT, on a policy on the ship Governor Strong, from Norfolk to Liverpool. To prove interest in Wilson, parol proof was offered that a transfer was made by Henderson to Wilson, to

Wilson's Administrator v. Young.

secure Wilson against his indorsement for Henderson. This transfer was by an instrument in writing.

The defendant's counsel objected that this testimony is not competent evidence without proof of the loss of the instrument, or otherwise accounting for its non-production. And of that opinion was the COURT. (THRUSTON, J., absent.)

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1811, AT WASHINGTON.

THOMPSON *v.* CARBERRY.

A surety in a replevin-bond is not a competent witness for the plaintiff in replevin, although he has an indemnifying bond.

REPLEVIN. Ignatius Middleton, one of the sureties in the replevin-bond, being sworn in chief, and asked if he was interested in the cause, said he was not. He was then examined and cross-examined. It was afterward discovered by the defendant's counsel that he was a surety in the replevin-bond. He acknowledged himself to be the person, but said he had a bond of indemnification, which he produced. The plaintiff then called him again, to examine him further. The defendant objected, and the Court refused to suffer him to be further examined; and told the jury that what he had already testified was not evidence.

DAVIS *v.* BEVERLY AND RIGGS.

The eleventh article of the association called "The Union Bank of Georgetown," which declares that every person dealing with them, "disavows having recourse, on any pretence whatever, to the person or separate property of any present or future member of the company," does not prevent a laborer from recovering judgment at law against the individual members of the association who employed him. But they may be relieved in equity.

ASSUMPSIT, for work and labor.

Mr. Morsell, for the defendants, contended that as the plaintiff had proved that the work and labor were done for the private banking association, called "The Union Bank of Georgetown," he was bound by the fourteenth article of that association, which declares that every person dealing with them "disavows having recourse, on any pretence whatever, to the person, or separate property of any present or future member of this company," and could not recover in this action brought against Beverly and

United States v. Craig.

Riggs individually, they being the persons with whom he contracted, and who were members of the association.

But the COURT (*nem. con.*) said that at the most it could only be considered as a contract on the part of the plaintiff, that he would not enforce his judgment against the person or property of the defendants; a contract which was binding on his conscience, and which they could not presume he would violate; and if he attempted to violate it, a court of equity might grant an injunction.

UNITED STATES v. THOMAS.

In a criminal case, parol evidence may be given to explain the intention with which a deed was made; and to prove that although it purported to convey a negro to the grantee, his executors and administrators forever, the grantor intended to convey only his own title.

INDICTMENT for selling negro Flora as a slave for life, who was entitled to freedom at a certain age. To support the prosecution the United States produced in evidence a mortgage from the defendant, Thomas, to a trustee for the security of Edgar Patterson, including, among other property, three negroes; one of whom, Flora, was entitled to freedom in about three years from the date of the deed. The other two were slaves for life. The deed made no distinction between them. The *habendum* was to the trustee, his heirs, executors, administrators, and assigns forever; with a power to the trustee to sell in case of any default; and a general warranty against the claims of all persons.

The defendant offered evidence that he had informed Mr. Patterson the *cestui que trust*, before the execution of the deed, that Flora was not a slave for life.

Mr. Caldwell, (who, in the absence of Mr. Jones, prosecuted for the United States,) objected that parol evidence could not be given to contradict the deed.

But the COURT (FITZHUGH, J., absent,) said that, in a criminal case, parol evidence might be given to explain the intention, the *quo animo*, with which the deed was made, and to prove that the defendant only meant to sell his right to her service during the term.

UNITED STATES v. CRAIG.

Peremptory challenge.

UPON an indictment for manslaughter by killing one Hilliard, the prisoner was allowed the right of peremptory challenge.

 Fitzhugh v. Blake.

PERRY v. RHODES.

Waiver of notice.

ASSUMPSIT against the indorser of a promissory note. The defendant, knowing that the plaintiff had neglected to give him notice, and had received part of the money from the maker, promised to pay the balance if the maker did not.

The COURT (FITZHUGH, J., absent,) was of opinion that the defendant had waived notice, and was liable.

 TAYLOE v. VARDEN.

Possession in fact, or in law, is necessary to maintain trespass *quare clausum fregit*.

UPON a case stated, the question was whether Tayloe had such a possession as would authorize him to bring trespass.

Varden, in 1806, took possession while the title to the freehold was in H. Lee, who never had any other seizin or possession than what was conveyed to him by the deed of bargain and sale from Pollock. Varden was in possession when Lee made the deed of bargain and sale to Tayloe, and continued in possession until this suit was brought. Tayloe never had entered, even if he had a right to enter.

The COURT (FITZHUGH, J., absent,) was clearly of opinion that, as Lee was out of possession when he made the deed of bargain and sale to Tayloe, the latter had not the possession, either in fact, or by construction of law; and therefore could not maintain an action of trespass.

 FITZHUGH, for the use of Leonard Mackall, v. BLAKE.

A *scire facias* to revive a judgment is not a new action; and if the original judgment was rendered in Maryland before the 27th of February, 1801, an execution, after the revival of the judgment by *scire facias* in Maryland, may be issued upon it by the clerk of this Court, under the Act of Congress of that date, section 13, upon the filing of an exemplification of the record; but the exemplification must be of the whole record in the suit; not of the proceedings upon the *scire facias* only.

When the judgment is for a penalty to be released on the payment of a smaller sum, that sum must be ascertained before the execution can be issued.

Mr. Law, for the defendant, moved to quash an execution issued by this Court upon an exemplification of a judgment upon a *scire facias* in Maryland, under the Act of Congress of the 27th of Feb-

Maupin v. Pic.

ruary, 1801, § 13, [2 Stat. at Large, 107,] because the *scire facias* was issued subsequent to that date. The original judgment was in 1799; the judgment on the *scire facias* was in 1804, in Maryland.

The COURT (FITZHUGH, J., absent,) was of opinion that the *scire facias* was not a new suit; and that the judgment upon it was such a judgment in a suit pending in a court in Maryland, on the 27th of February, 1801, as would justify the clerk of this Court to issue an execution upon the original judgment thus revived, under the 13th section of the act of 27th February, 1801.

Mr. Law then contended, that if the *scire facias* was not a new suit commenced after the date of that act, the exemplification should have been of the whole record, including the original judgment and the proceedings which led to it, and not of the proceedings upon the *scire facias* alone.

Mr. Law also objected that the execution does not pursue the original judgment. It is for a certain sum to be released on the payment of such sum as Leonard Mackall, for whose use the execution is docketed, shall say is due; which is no part of the original judgment.

The COURT (FITZHUGH, J., absent,) quashed the execution, on the ground that the exemplification of the original judgment was not filed before issuing the execution; and because the release was uncertain.

 UNITED STATES v. SMITHERS.

Peremptory challenge.

INDICTMENT under the Statute of Maryland, 1795, c. 75, for forging orders on Joseph Wheaton. By the statute the punishment is not death. He was not allowed a peremptory challenge; was found guilty, and punished by whipping, twenty-five stripes. See the Act of Maryland.

 MAUPIN, and Catharine his wife, v. FRANCIS PIC.

When a contract has been executed, *indebitatus assumpsit* will lie for the amount due upon it.

Evidence of the pendency of a suit, between the plaintiff Catharine alone, by the name of Catharine Frisset, against the present defendant, for the same cause of action, at the time of bringing the present suit, will not support the issue upon the plea of the pendency of a suit between the parties to the present suit.

INDEBITATUS ASSUMPSIT for work and labor.

Thompson v. Carbery.

Mr. Morsell, for the defendant, contended that as there was a letter stating the terms to be twelve dollars a month, and no count upon that special agreement, the plaintiff could not recover upon the *indebitatus assumpsit*. 1 Com. on Contr. 228.

But the COURT (FITZHUGH, J., absent,) said that when a contract has been executed, *indebitatus assumpsit* will lie for the amount due upon it.

There was a plea in bar that at the time of commencing this suit, there was another suit depending between the same parties for the same cause of action. The evidence to support this issue, was of a suit by Catharine Frisset alone, who was one of the present plaintiffs, for the same cause of action; which was discontinued after the present suit was brought.

The COURT instructed the jury that it was not such a suit between the same parties as would support the issue on the part of the defendant.

MINIFIE v. DUCKWORTH.

Upon an appeal from the judgment of a justice of the peace, the cause is to be tried *de novo*.

THE COURT said that the appeal suspended the judgment below, and the cause must be tried *de novo*, as if no judgment had been rendered.

THOMPSON v. CARBERY.

In replevin, if the title to the goods be in issue, the Court will grant a new trial, if the jury give the defendant a verdict for the value of the goods, as well as damages for taking them.

THIS was a motion for a new trial in an action of replevin, for a female slave, in which there was a verdict for the defendant for 425 dollars damages.

Mr. F. S. Key, for the plaintiff. The jury have given the value of the slave in damages; and as there will be judgment for a return of the property the defendant will get twice the value of the slave.

Mr. Jones, contra, said he had contended for vindictive damages; and the question is whether these damages are enormous.

The COURT said it was evident that the jury had given their verdict under a mistake, having given the value of the negro as well as damages; and that as the defendant would have judg-

Thompson v. Carbery.

ment for a return of the property, and a remedy upon the replevin-bond if it should not be returned, they would grant a new trial, unless the parties would agree upon a compromise. The defendant refused, and a new trial was granted upon payment of all the costs. (FITZHUGH, J., absent.)

CIRCUIT COURT OF THE UNITED STATES.

JUNE TERM, 1812, AT WASHINGTON.

TRAVERS *v.* HIGHT.

Affidavit to hold to bail.

THE account was headed "George W. Hight to Esias Travers, Dr., for articles furnished by his direction, and he to be answerable for the payment thereof." Among other items was a charge for rations for the officers, &c., (George W. Hight being a recruiting officer.) An affidavit of the plaintiff was indorsed on the paper, "that the within account is just and true as stated."

The COURT (FITZHUGH, J., absent,) said it was not sufficient. It was neither a positive affidavit that the defendant was indebted to the plaintiff in a certain sum; nor was it such an affidavit as made the account evidence *per se*, under the Act of Assembly of Maryland, 1729, c. 20, § 9, according to the rule in the case of *Smith et al. v. Watson*, at June term, 1806, in Washington, [1 Cranch, C. C. 311.]

Mr. Jones for the plaintiff. *Mr. Caldwell* for the defendant.

MILLER *v.* WHEATON & BRISCOE.

Affidavit to hold to bail.

Mr. F. S. Key, for Briscoe, moved to enter his appearance for this defendant without bail. The plaintiff had filed, as his cause of action, a promissory note of Wheaton, and an affidavit by an indifferent witness that Briscoe acknowledged to him that he was a partner with Wheaton in the transaction and equally liable for the debt.

The COURT (FITZHUGH, J., absent,) held it to be sufficient to hold Briscoe to bail.

United States v. Duvall.

YOUNG v. MORIATY.

Affidavit to hold to bail.

THE affidavit to an account for cash lent, was "that the above account as stated, is just and true and that the plaintiff has not received any part, parcel, or satisfaction for the same;" (but it does not say that the plaintiff had received no security.)

THE COURT (CRANCH, C. J., doubting,) was of opinion that it was sufficient to hold the defendant to bail.

UNITED STATES v. OVERTON.

The widow and administratrix of a deceased tavern-keeper cannot sell spirituous liquors under her husband's license; nor can she transfer it to another.

INDICTMENT for selling liquor as an ordinary-keeper, without license.

The defendant justified under a written authority from Mrs. Smallwood, the widow and administratrix of Walter B. Smallwood indorsed on the original license which had been granted to him in his lifetime.

THE COURT (THRUSTON, J., *contrà*,) said that Mrs. Smallwood had no authority to sell under her husband's license after his death. It is a personal trust. The recognizance given by the husband cannot be forfeited after his death by any misconduct of his widow.

The jury found the defendant guilty, and the Court rendered judgment for the fine of 600 lbs. of tobacco, under the Act of Assembly of Maryland.

UNITED STATES v. DUVAL.

A person who hires out his billiard-room for two days, is liable to the penalty of the Act of Maryland, 1798, c. 113.

INDICTMENT for keeping a billiard-table for use, without license.

THE COURT (FITZHUUGH, J., absent,) decided that the defendant who had hired a room in the county of Washington, (out of the jurisdiction of the corporations of Washington and Georgetown,) and set up his billiard-table in it, and rented it to Scott,

United States v. Wells.

for two days, for 30 dollars, was liable to the penalty of 150 dollars, under the Act of Assembly of Maryland, 1798, c. 113; and that it was immaterial whether he received the rent all at once, or by sixpence a game. Verdict, guilty — fined 150 dollars.

 UNITED STATES v. HEDGES.

The word "seal" in a scroll, is a seal to a justice's warrant. *Quære.*

INDICTMENT for assault and battery upon Bates, a constable, in the execution of a justice's warrant for debt.

The warrant had only a printed scroll and the word "seal," thus, [SEAL.]

Mr. F. S. Key, for the defendant, objected that it was not a seal.

The COURT (*FITZHUGH*, J., absent,) said that in this part of the country it is a seal according to common usage. *Quære.*

 UNITED STATES v. WELLS.

Bank-notes are not money.

INDICTMENT for cheating one Hollingshead of 80 dollars of his money at cards, (*Faro.*) The evidence was that bank-notes were won. Verdict, guilty — motion for a new trial.

Mr. C. Lee, and *Mr. Morsell*, for the defendant, contended that bank-notes are not money; and cited *Grigsby v. Oakes*, 2 B. & P. 436; *United States v. Morgan*, in this Court, [1 Cranch, C. C. 278;] *East*, Cr. Law, 597, 598, 599.

Mr. Jones, *contra*, cited *Miller v. Race*, 1 Burr. 457; *Rumball v. Murray*, 3 T. R. 298; *Wright v. Read*, 3 T. R. 554; *Cousins v. Thompson*, 6 T. R. 335.

The COURT (*nem. con.*) was of opinion, that on an indictment, evidence of bank-notes is no evidence of money. No case has been shown in which it has been admitted. In the cases cited the question was what was the general understanding of the word in common acceptation; but in an indictment the words are to be construed according to their strict legal meaning.

Way v. Selby.

UNITED STATES v. GILLIS *et al.*

Judges of elections are not liable to criminal prosecution, unless they have acted from a corrupt motive.

Mr. Jones, Attorney for the United States, observed that it had been intimated by the Court that these prosecutions could not be supported unless a corrupt motive were charged and proved; and that if such was the opinion of the Court, as he could not prove such a motive, he would enter a *nolle prosequi*.

The COURT (*nem. con.*) said that such was their opinion. *Nolle prosequi* entered.

TRUNDLE v. HEISE.

If the defendant has been discharged under the insolvent law upon a *capias ad respondendum*, the marshal will be discharged from his amercement for not bringing him in at the return of the writ, upon the defendant's entering his appearance in proper person.

THE marshal was amerced for not bringing in the defendant on the return of the *capias ad respondendum*. The defendant had been discharged under the insolvent act. The marshal moved to be discharged from the amercement upon the defendant's entering his appearance in proper person without bail; granted.

WAY, Trustee of Vanzandt v. SELBY.

Affidavit to hold to bail.

N. B. VANZANDT had been discharged under the insolvent act. The account was headed "Martha Selby, Dr. to estate of N. B. Vanzandt." To this was appended an affidavit of Mr. Vanzandt that the account was just and true as stated, and that he had received no part, parcel, security, nor satisfaction therefor, more than the credits given.

Mr. F. S. Key, for the defendant, moved to appear without bail because there ought to be an affidavit by Way, the trustee, that he had not received the balance.

The COURT was of that opinion and permitted the defendant to appear without bail.

LENOX *et al.* v. WRIGHT.

Upon a note due 23d and 26th July, demand and notice after the 28th are too late ; but demand and notice on the 27th is not.

ASSUMPSIT against the indorser of a promissory note due 23d and 26th July, 1809. The defendant lived in Georgetown, D. C., about three miles from the plaintiffs.

The COURT instructed the jury that notice given to the defendant, or left at the post-office, after the 28th was too late, but refused to instruct the jury that demand and notice on the 27th was too late. The notice was not, in fact, put into the post-office in Washington until the 30th of July. Verdict for the defendant.

UNITED STATES v. MARY McNEMARA.

An indictment for forcibly taking bank-notes from another, must state whose property they were.

INDICTMENT, that the defendant, with force and arms, unlawfully, injuriously, violently, and fraudulently did seize and take from one John Lyon fourteen bank-notes of the value of seventy-five dollars lawful money of the United States and him the said John Lyon, of the said bank-notes did fraudulently, violently, and by open force and violence strip and deprive, to the great loss and damage of the said John Lyon, and against the peace and government of the United States.

The COURT (FITZHUGH, J., absent,) on motion arrested the judgment because it was not stated in the indictment, whose property the bank-notes were.

UNITED STATES v. WELLS.

The by-law of Georgetown, prescribing a penalty for keeping a public gaming-table, does not supersede, nor repeal the Maryland Act, 1797, c. 110, prescribing a penalty for keeping a faro-table in a house occupied by a tavern-keeper.

INDICTMENT under the Act of Assembly of Maryland, 1797, c. 110, for keeping a faro-table in a house occupied by a tavern-keeper.

There was a verdict for the defendant, at the last term, and a motion for a new trial, upon a question of law reserved, namely, whether the defendant was liable to the fine of £50 imposed

Thompson's Administrator v. Afflick's Administrator.

by the Act of Assembly, he having been fined by a justice of the peace 20 dollars under the by-law of the corporation of Georgetown, of March 7, 1806, which enacts that any person who shall keep any public gaming-table or device for common gaming, within the corporation, shall "for every offence of gaming at such table or device for gaming, forfeit and pay the sum of twenty dollars." The offence for which he was thus fined was one of the acts of gaming at the faro-table for the keeping of which, in a house occupied by a tavern-keeper, the present indictment was found.

The charter of the corporation of Georgetown gave them power "to restrain or prohibit gambling;" and authority to pass all laws not inconsistent with the laws of the United States, which may be necessary to carry into effect all the powers vested in the corporation.

The COURT (FITZHUGH, J., absent,) was of opinion that the payment of the fine under the by-law did not prevent the operation of the general law, (1797, c. 110,) and ordered judgment to be entered up for the penalty of £ 50.

UNITED STATES v. TOMPKINS.

The Court will not quash an indictment because there was no previous presentment, or order of the Court.

INDICTMENT for forgery.

Mr. F. S. Key, for the defendant, moved to quash the indictment because there had not been a previous presentment, or order of the Court; nor was it found by the grand jury of their own knowledge, according to the Maryland Act of 1722, c. 5.

But the COURT (FITZHUGH, J., absent,) refused.

THOMPSON'S ADMINISTRATOR v. AFFLICK'S ADMINISTRATOR.

The Court will not permit the plea of the statute of limitations to be filed after the rule-day, unless it be shown by affidavit to be necessary for the justice of the case.

Mr. Jones, for the defendant, before the plea day, indorsed on the declaration, these words, "*Non assumpsit*; Stat. Lim.: set-off; account in bar," as his pleas. Upon the calling of the imparlance docket, *Mr. Key* objected to the plea of the

United States *v.* Winslow *et al.*

statute of limitations because it was not written out at full length and filed at or before the rule-day.

Mr. Jones offered to file it *nunc pro tunc*.

But the COURT (THRUSTON, J., absent,) refused to receive it, unless it should be shown by affidavit, to be necessary for the justice of the case.

PORTER *v.* RAPINE.

A creditor may give a credit upon his account so as to give jurisdiction to a justice of the peace.

APPEAL from a justice of the peace. Rapine had a demand on Porter for \$26.85; he gave credit for \$6.85 and warranted Porter for \$20, and obtained judgment for \$20 and costs. Porter appealed and contended that Rapine had no right to release part of the debt so as to give jurisdiction to a justice of the peace. It did not appear that he objected to the credit before the justice.

The COURT (FITZHUGH, J., absent,) affirmed the judgment.

UNITED STATES *v.* THOMAS WINSLOW. SAME *v.* MARK WINSLOW.

Forgery of the note of a private, unchartered bank, may be punished under the Maryland Act of 1799, c. 75, § 1. So also the forgery of the notes of chartered banks.

THE indictment against Thomas Winslow was for counterfeiting and passing a note of the Bank of Potomac, a private, unchartered bank. The prisoner pleaded guilty, and being recommended to mercy, by the bank, in consequence of disclosures as to other offenders,

The COURT sentenced him to six months' imprisonment, to pay a fine of 100 dollars, and to stand committed until the fine and costs should be paid. This sentence was under the Maryland Act of 1779, c. 75, § 1.

The indictment against Mark Winslow was for forging the bank-notes of chartered banks, namely: The Farmers' Bank of Alexandria, and the Bank of Virginia, with intent to defraud those banks.

The COURT passed a like sentence.

Gilman v. A. King & Co.

GILMAN v. A. KING & Co.

A promissory note made in Georgetown, D. C., in the year 1810, payable to C. L. Nevitt or order, at 60 days, "negotiable in the Bank of Alexandria," is governed by the laws in force in Alexandria; and the holder in an action against the maker, must allow all just discounts against the payee before notice of the assignment given to the maker.

An indorser is a competent witness for the maker of a note, to prove that the indorsement was without consideration, and to give credit to the note, but the payee is not a competent witness for the plaintiff.

ASSUMPSIT upon the promissory note of A. King and Company, dated September 7, 1810, at sixty days, payable to C. L. Nevitt or order, "negotiable at the Bank of Alexandria," indorsed by Nevitt to Preston, and by Preston to the plaintiff.

The defendant claimed to discount C. L. Nevitt's note to him, under the Virginia law, of the 4th of December, 1786, § 4, pp. 36, 37, by which the assignee is bound to allow the defendant all just discounts before notice of the assignment.

Mr. E. J. Lee, for the plaintiff, contended that by the 19th section of the Act of Congress, "concerning the Bank of Alexandria," [2 Stat. at Large, 625,] such a note, when indorsed, was to be considered as a bill of exchange, and as governed by the laws applicable to that species of mercantile instruments. But it was discovered that the printer had misrepresented the date of that act, February 15, 1810, instead of 1811, which was subsequent to the date of the note, and therefore could not affect its character for negotiability.

Mr. Lee and Mr. Taylor, then contended that the note was to be governed and construed by the law of the place where it was made, and cited *Robinson v. Bland*, 2 Burr. 1077; *Stapleton v. Conway*, 3 Atk. 727; 1 Eq. C. Ab. 288, 289; *Melan v. Duke de Fitzjames*, 1 B. & P. 142; *Talleyrand v. Boulanger*, 3 Ves. 449; *Holman v. Johnson*, Cowp. 343; and *Alves v. Hodgson*, 7 T. R. 241.

Mr. Swann and Mr. Jones, for the defendant, cited *Robinson v. Bland*, 2 Burr. 1077; *Norton v. Rose*, 2 Wash. 233; *Lord Ranelagh v. Champante*, 1 Eq. Ca. Ab. 289.

The COURT, (*nem. con.*) considered the note of A. King & Co. as an Alexandria contract, and suffered the note of C. L. Nevitt to be given in evidence by the defendant as a discount.

The COURT permitted Preston, the indorser, to be examined as a witness for the defendant to prove that he (Preston) indorsed without consideration to give credit to the note; and refused to admit C. L. Nevitt, the payee, as a witness for the plaintiff, because, if the plaintiff succeeded, the witness would be discharged from his liability.

The verdict was for the defendant, and the Court, (*nem. con.*) refused a new trial, after argument.

NEWTON & MUNCASTER v. REARDON.

Case will lie for use and occupation of land in Virginia; but all the joint tenants or tenants in common interested with the plaintiffs must be joined as plaintiffs in the action: and if they are not, the defendant may take advantage of the omission without pleading it in abatement.

CASE, for use and occupation of land at Occoquan in Virginia.

Mr. E. J. Lee and *Mr. Taylor*, for the defendant, contended that an action for use and occupation did not lie before the statute of 11 Geo. 2, c. 19, § 14, and that as that act is not in force in Virginia, no such action could be maintained in Alexandria county which is governed by the laws of Virginia as they existed in 1801. Esp. N. P. 19; *Green v. Harrington*, Hutt. 34; 1 Bac. Ab. 257, Gwillim's Ed.; *Wilkins v. Wingate*, 6 T. R. 62; *Brett v. Read*, Cro. Car. 343.

The COURT (THRUSTON, J., absent,) was of opinion that the action for use and occupation would lie; but that, as the plaintiffs had read in evidence a deed to them and one Smoot, who is dead, but whose heirs are living, the plaintiffs could not recover in this suit; there being no evidence of any express agreement to hold under the plaintiffs.

The plaintiffs, thereupon became *nonsuit*, with leave to *Mr. Swann* to move to reinstate the cause without costs. At a subsequent day *Mr. Swann* made the motion, and contended that the defendant could only take advantage of the omission to join the other tenants in common, by a plea in abatement, and cited the following authorities: *Addison v. Overend*, 6 T. R. 766; 3 Bac. Ab. 708, Gwillim's Ed. by Wilson; *Stowell's case*, Moore, 466; *Deering v. Moor*, Cro. Eliz. 554; *Anonymous*, Skinner, 12; *Haywood v. Davies*, 1 Salk. 4; *Blackburn v. Graves*, 1 Mod. 102; Carth. 63, S. C.; *Nelthorpe & Farrington v. Dorrington*, Bul. N. P. 36; *L'Eglise v. Champante*, 2 Str. 820; 2 Bl. Com. 186; Lit. § 314, 316; *Harrison v. Barnby*, 5 T. R. 246; *Martin v. Crompe*, 1 Ld. Raym. 340; 3 Bac. Ab. 706; *Cutting v. Derby*, 2 W. Bl. 1077; *Cooke v. Loxley*, 5 T. R. 4; *Doe v. Prosser*, Cowp. 217.

In ejectment, the defendant cannot upon the general issue take advantage of the omission of the other joint tenants. Tenants in common may join or sever in the recovery of their rights. By the law of Virginia the right of survivorship is abolished, and the plaintiffs were tenants in common with the heirs of Smoot. In debt for rent they may join, but in avowry they must sever; because the first is a personal action; but the other savors of the realty. One tenant in common may distrain and recover although the ten-

ant has paid the whole rent to the other tenant in common. If tenants in common sever in debt for rent, each will recover only his share. Where the plaintiffs' claim is founded upon their title in law, they shall recover according to the title they can show. But in this case the plaintiffs can recover the whole rent. This would certainly have been the case if the defendant had expressly agreed to hold under the plaintiffs. He could not then deny their title. By the death of Smoot the possession was severed. It is not necessary to show that the heirs of Smoot were ousted by the plaintiffs. They were infants and could not have licensed any one to occupy the land. The defendant therefore did, in fact, hold under the plaintiffs alone, and having been permitted by them to use and occupy the land, he cannot now deny their title.

Mr. Taylor, for the defendant, *contra*. There is no evidence that the possession of the plaintiffs is adverse to the heirs of Smoot. The cause of action arises merely by implication of law, in consequence of the defendant's use and occupation of land which in law belongs to, or is in the possession of the plaintiffs. Unless there was some agreement by the defendant to hold of the plaintiffs, their title to recover depends upon their title to the land. All the tenants in common must join in an action which affects the possession alone; but whenever the action brings the title in question they must sever. The reason is given in Lit. § 314, namely: that tenants in common have several titles, and several reversions, if they make a lease for years or life, rendering rent, a tenant in common may bring debt for his moiety of the rent. But the action for use and occupation, is not a claim for rent; it is a mere personal demand; it has no relation to the reversion; there can be no distress. In an action upon a joint contract brought by one only the defendant is not bound to plead in abatement. But it is otherwise in cases of tort. *Cully v. Spearman*, 2 H. Bl. 386; *W. Jones*, 253; S. P., *L'Eglise v. Champante*, 2 Str. 820; *Graham v. Robertson*, 2 T. R. 282; *Kirkman v. Newstead*, Esp. N. P. 117; *Chitty on Pleading*, 6, note 7; *Saund.* 125, 291; *Scott v. Goodwin*, 1 B. & P. 73; *Addison v. Overend*, 6 T. R. 770.

Mr. Swann, in reply. This is not an action merely in the personality. It is in the nature of an action for rent. Whenever the suit is for the issues and profits of the land, it savors of the realty; and tenants in common may sever, whether the action be covenant, or debt, or avowry, or case, or assumpsit for use and occupation. Debt for double rent may be maintained by one tenant in common. If the claim arises out of the title, and if it be necessary to show the title then it comes under the law respecting the realty. The action for use and occupa-

tion is a substitute for the action of debt for rent, and is governed by the same rules. *King v. Frazer*, 6 East, 348.

CRANCH, C. J., after reviewing authorities, cited, All the cases in which it has been held that the defendant must plead joint-tenancy, or tenancy in common of the plaintiff with others in abatement, are cases of tort.

In cases of contract, whether express or implied, the defendant may show in evidence upon the general issue, that other persons than the plaintiffs are equally entitled to sue. I therefore think we were correct in the opinion which we gave at that trial and would refuse to reinstate the cause. And of this opinion was the whole Court.

In addition to the cases cited in the argument, the following were noticed by the Court: *Dockwray v. Dickenson*, Skinner, 640; S. C. Comb. 366; *Harman v. Witchlow*, Latch, 152; *Child v. Sands*, Salk. 32; *Brown v. Hedges*, Salk. 290; *Garrett v. Taylor*, Esp. N. P. 117.

CURRAY v. McMUNN'S EXECUTOR.

The executor, upon *plene administravit*, is not to be charged with lands devised to him to be sold, if necessary, to pay debts.

THE defendant pleaded *plene administravit*.

Mr. E. J. Lee, for the plaintiff, contended that the defendant was to be charged with the lands devised to the executor to be sold if necessary to pay the debts.

But the COURT (THRUSTON, J., absent,) was clearly of a contrary opinion. A bill of exceptions was taken, but no writ of error prosecuted.

GRAY AND OTHERS v. THE DIRECTORS OF THE MECHANICS' BANK OF ALEXANDRIA.

Under the charter of the Mechanics' Bank of Alexandria, it is not necessary that the eight directors who are to be practical mechanics, should be in actual practice at the time of the election.

RULE to show cause why a *mandamus* should not issue to the Directors of the Mechanics' Bank of Alexandria, to admit the complainants as directors, in the place of Mr. Langdon, Mr. McGuire, and Mr. Weightman, who, it was alleged, were not practical mechanics at the time of their election.

Bank of Alexandria v. Young.

The 5th section of the charter of the 16th of May 1812, requires that "there shall be fifteen directors, eight of which at least shall be practical mechanics."

Mr. C. Lee, for the defendants, objected that this was not a case for a *mandamus*, although it might perhaps be a case for an information in the nature of a *quo warranto*.

Mr. Taylor, in support of the authority of the Court to issue the *mandamus*, cited 2 Esp. N. P. 661, 666; *Anonymous*, Str. 696; *Rex v. Turkey Company*, 2 Burr. 1000; *Rex v. Surgeons Company*, 2 Burr. 892; *Rex v. Barker*, 3 Burr. 1265; 5 Com. Dig. 22.

The COURT directed the complainants to suggest their case, and support it by affidavits; and said they would consider it and the question of jurisdiction.

Afterwards, the COURT (*nem. con.*) was of opinion that it is not necessary that any of the directors should be in actual practice at the time of the election. They gave no opinion as to the jurisdiction.

LYNN, surviving Partner of LYNN & DODSON v. HALL.

The defendant cannot set off a separate debt of one partner against a partnership claim.

THE defendant offered to set off a claim against Dodson alone. The COURT (*nem. con.*) refused.

BANK OF ALEXANDRIA v. ROBERT YOUNG.

If the indorser of a note write on the face of it these words, "credit the drawer," the note and indorsement are not evidence of money had and received by the indorser, to the use of the indorsee who had discounted the note and applied the proceeds to the credit of the maker.

The Bank of Alexandria, in 1807, was bound to demand payment of the maker, and give notice to the indorser of the non-payment, before they could maintain an action against him.

ASSUMPSIT against the indorser of the note of James and Alexander Smith, dated June 13th, 1807, at fifty-four days, payable on the 6th and 9th of August. Payment was demanded and notice given on the 9th of September. At the bottom of the note was this memorandum, "credit the drawers."

The COURT (THRUSTON, J., absent,) said that such a note with such a memorandum on its face, was not evidence of money had and received by the defendant to the use of the plaintiffs, on the count for money had and received.

Miller's Adm'r v. Young.

Mr. C. Simms, for the plaintiffs, contended that it was not necessary, in order to make the indorser liable, that he should have had notice of the non-payment by the makers. By the charter of the bank, § 20, the indorser was as much bound to pay the note, at the moment it became payable by the maker, as the maker himself was. The language of Chief Justice Marshall, in *Yeaton v. Bank of Alexandria*, 5 Cranch, 49, is very strong to that effect.

Mr. E. J. Lee, contra. The only point decided in that case is, that it is not necessary to sue a solvent maker before suing the indorser.

The charter of the Bank of Columbia has the same words as the charter of the Bank of Alexandria, and yet, the Supreme Court, in the case of the *Bank of Columbia v. French*, 4 Cranch, 141, have considered it as a case governed by the laws of bills of exchange.

The COURT (FITZHUGH, J., *contra*,) was of opinion that the bank was bound to demand payment from the maker, and, on his refusal, to give notice thereof to the indorser, before they could maintain an action against him.

 MILLER'S ADMINISTRATOR v. ROBERT YOUNG.

The statute of Virginia against conveying pretended titles does not vacate the deed, as between the parties.

If the creditor accepts a deed of land in payment of the debt, it is a bar to an action for the debt, and if the title be defective, the creditor must look to his warranty.

In taking a deposition under the Act of Congress, it is not necessary that the party or the magistrate should give notice to the adverse party or his attorney, if neither be within one hundred miles of the place of caption; nor that the magistrate should certify that he was not of counsel for either of the parties, nor interested in the event of the suit.

INDEBITATUS ASSUMPSIT for goods sold and delivered. The defence was, that the defendant paid the debt by a deed of land in Kentucky, with general warranty, which the plaintiff received in payment. To this the plaintiff replied that the title was bad—that the defendant never had possession of the land, and had no title.

Mr. Jones and *Mr. Taylor*, for the plaintiff, contended that the deed was void under the Virginia Act, of 6th of December, 1786, against conveying pretended titles, which was in force in Kentucky, and did not destroy the original cause of action for goods sold; and if not void under that statute, yet, as the defendant had no title, it was no payment, and the plaintiff had a right to recover in this action. *Moses v. McFerlan*, 2 Burr. 1012; *Dutricht v. Melchor*, 1 Dall. 428; *Cochran v. Cummings*, 4 Dall. 250.

 Gilpin v. Plummer.

Mr. C. Lee and *Mr. E. J. Lee*, *contrà*. The deed was executed, delivered and accepted, and contained a warranty of title upon which the plaintiff may have his remedy; and whenever a party has a remedy upon a sealed instrument, he is bound to resort to it. *Preston v. Young*, 4 Cranch, 239; *Touissaint v. Martinnant*, 2 T. R. 105; *Weaver v. Bentley*, 1 N. Y. Term Rep. 49; *Sugden*, 175; *Hunt v. Silk*, 5 East, 449; *Lindon v. Hooper*, Cowp. 414. The statute against pretended titles, if in force in Kentucky, does not vacate the deed. *Duwall v. Bibb*, 3 Call, 362. The plaintiff ought to have returned the deed, and reconveyed the property before he brought this suit. *Pollard & Pickett v. Dwight*, 4 Cranch, 421.

On the trial, *Mr. C. Lee*, for the defendant, objected to a deposition taken on behalf of the plaintiff, that notice was not given to the defendant, although neither the defendant nor his attorney was within one hundred miles of the place of caption; and contended that the statute only dispenses with notice by the magistrate, not by the party. It does not say that the deposition, in such case, may be taken without notice—and the party is as much bound, in justice, to give notice when taking a deposition under the Act of Congress, as under a *dedimus*.

The COURT, however, (THRUSTON, J., absent,) without hearing the other side, overruled the objection.

Mr. E. J. Lee, for the defendant, also objected to the deposition that the magistrate had not certified that he was not of counsel for either party, nor interested in the event of the cause.

But the COURT overruled this objection also.

The parties agreed that judgment should be rendered for the plaintiff upon certain terms.

The COURT, however, (THRUSTON, J., absent,) had made up their opinion, that the statute against pretended titles did not vacate the deed; and that the agreement to settle the account, being executed by a deed with general warranty, which was accepted by the plaintiff, the transaction was closed and could not be disaffirmed; and that the plaintiff must resort to his warranty.

GILPIN, Assignee, &c. v. PLUMMER.

The Maryland Statute of Limitations of twelve years, is a bar to an action against the devisee of the obligor, brought in Alexandria upon a bond executed and assigned in Maryland; all the parties having continued to reside in Maryland until the expiration of the twelve years.

A payment of part of the debt, by the executor, within the twelve years, does not take the case out of the statute, as to the heirs and devisees.

DEBT, in Alexandria, against the devisee of the obligor of a

bond, made in Maryland, and due in the year 1788; more than twelve years before the commencement of the suit. All the parties resided in Maryland until the expiration of the twelve years. The bond was assigned to the plaintiff, in Maryland, but not in such form as the Maryland law required to enable the assignee to bring a suit upon it in his own name.

This objection was taken in argument, but not decided by the Court.

The defendant pleaded the Maryland Statute of Limitations, 1715, c. 23, § 6, by which it is enacted "that no bill, bond, judgment, recognizance, statute merchant, or of the staple, or other specialty whatsoever," (except such as shall be taken in the name of the king, &c.) "shall be good and pleadable, or admitted in evidence against any person or persons of this province, after the principal debtor and creditor shall have been both dead twelve years, or the debt or thing in action above twelve years standing;" "saving," &c. To this plea the plaintiff replied a payment made by the executor in 1798; to which replication the defendant demurred.

Mr. Swann, for the defendant, made two points.

1. That the Maryland statute was a bar; all the parties having resided there until the action was barred.

2. That the plaintiff, as assignee, could not recover upon the bond in his own name, the assignment not having been made in the form prescribed by the Maryland statute, 1763, c. 23, § 9 and 10. The law of Maryland is the law of this contract. *Warder v. Arell*, 2 Wash. 282; 2 Fonb. 442. The defendant is only one of the devisees, and cannot recover contribution from the others, if the law of Maryland is not a bar here as well as there.

A payment, or acknowledgment, or even a new promise by the executor, cannot keep the bond alive against the heir or devisee. There is no privity between them. *Quarles v. Littlepage*, 2 Hen. & Mun. 401; *Henderson v. Foot*, 3 Call, 248; *Fisher v. Duncan & Turnbull*, 1 Hen. & Mun. 563.

Mr. Taylor, contra. The Statute of Limitation of Maryland applies only to the remedy, and can be enforced only in the Courts of that State. It does not destroy the debt. In *Olive et al. v. Mandeville*, in June term, 1805, this Court refused the defendant leave to amend by pleading the English Statute of Limitations.

There is no case in which the statute of limitations of another state has been pleaded.

Although the assignment is not under seal, as required by the

statute of Maryland, yet it is sufficient under the law of Virginia, which is in force here.

The COURT (*nem. con.*) was of opinion that the bar was good; and overruled the demurrer.

BROCKETT v. HAMMOND.

If there be a special agreement, not under seal, and the plaintiff has executed it on his part exactly according to its terms, he may recover the contract price in an action of *indebitatus assumpsit*, for work and labor done, and materials furnished, without a special count upon the written agreement.

INDEBITATUS ASSUMPSIT and *quantum meruit* for work and labor done, and materials furnished.

The defendant proved a special agreement in writing, not under seal.

The plaintiff offered to prove that he did the work, &c., exactly according to the agreement, and that the price stated in the general *indebitatus assumpsit*, was the contract price.

Mr. Taylor, for the defendant, objected that the plaintiff could not recover upon the general count.

But the COURT (THRUSTON, J., absent,) overruled the objection.

See 1 Chitty on Pleading, 340; *Gordon v. Martin*, Fitzgibbon, 302; *Alcorn v. Westbrook*, 1 Wilson, 117; Bul. N. P. 139; *Giles v. Edwards*, 7 T. R. 181; *Mussen v. Price*, 4 East, 147; *Atty v. Parish*, 1 New Rep. 104; *Cooke v. Munstone*, 1 New Rep. 351; *Clarke v. Gray*, 6 East, 569; *Brooke v. White*, 1 New Rep. 331; *Bank of Columbia v. Patterson*, February Term, 1813, Supreme Court of the United States, 7 Cranch, 299.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1812, AT ALEXANDRIA.

CONWAY'S EXECUTORS v. ALEXANDER.

Costs are not given upon reversal in the Supreme Court of the United States.

UPON a mandate from the Supreme Court of the United States, reversing the decree of this Court, and ordering the bill to be dismissed,

Mr. C. Lee, moved this Court to award costs of the Supreme Court, as well as of this Court against the complainant.

But the COURT (*FITZHUGH, J.*, absent,) refused as to the costs of the Supreme Court.

GILPIN, Judge of the Orphans' Court, for the use of FAXON, v.
CRANDELL'S ADMINISTRATRIX.

An action cannot be maintained, under the laws of Virginia, upon an administration bond, until a *devastavit* shall have been established in a suit against the administrator.

DEBT on the administration bond of Crandell, who was a surety in Dyson's administration bond, for the non-payment of a debt due from Dyson, the intestate, and for which a judgment had been recovered by Faxon against Dyson's administratrix. The defendant pleaded that Dyson's administratrix had performed the conditions of the administration bond. The plaintiff replied that she had not, in this: that Faxon had recovered judgment against her *de bonis intestatoris*, for \$59, upon which a *feri facias* was returned *nulla bona*, and that she had assets, but wasted them; to which there was a general replication and issue.

Mr. E. J. Lee, for the defendant, contended that he had a right to prove a *devastavit* in this case, in the same manner as if the plea had been pleaded by Dyson's administratrix herself in a suit against her.

Carter's Heirs v. Cutting & Wife.

But the COURT, (*nem. con.*) was of opinion, under the decisions in Virginia, that this suit was not maintainable; as no *devastavit* had been established in a suit against Dyson's administratrix.

 GILMAN v. HERBERT.

A sale of goods in the possession of the vendor's bailee, is fraudulent as to creditors, unless the possession accompany and follow the sale, or an order be given by the vendor, and served on the bailee, to deliver possession to the vendee.

TROVER, for fifty barrels of salt, &c. Douglass, in May or June, 1810, being indebted to Gilman, agreed that he should have this property, which was then in the possession of Shuck, and gave Gilman a written order to Shuck to deliver the goods to Gilman, who neglected to give notice to Shuck of this order, until after Douglass had taken the oath of an insolvent debtor, and Herbert was appointed his trustee, and demanded the goods of Shuck as the property of Douglass.

Mr. Taylor, for the defendant, prayed the Court to instruct the jury, that the sale under those circumstances, was fraudulent as to the creditors of Douglass, unless the jury should be satisfied by the evidence that the possession accompanied and followed the deed; and that the order to Shuck did not transfer the possession from Douglass to Gilman, if notice of such order was not given to Shuck until after the discharge of Douglass under the insolvent law, and after the defendant had claimed them, as trustee.

Which opinion the COURT gave. (THURSTON, J., absent.)

Mr. E. J. Lee, took a bill of exceptions, but did not prosecute a writ of error.

 CARTER'S HEIRS v. I. B. CUTTING & WIFE.

An issue, sent by the Orphans' Court to this Court, to try the validity of a will, cannot be removed to the other county, under the Act of Congress of the 24th of June, 1812, § 8.

An issue was sent by the Orphans' Court of this county, to this Court, to try the question *devisavit vel non*.

Mr. R. J. Taylor, for the defendant, made a motion to change the *venue* to Washington County, founded upon the defendant's affidavit of partiality and general prejudice in this county. This motion was made under the Act of Congress [2 Stat. at Large, 757,] of the 24th of June, 1812, § 8, "to amend the laws within the District of Columbia."

The COURT, however, (THURSTON, J., absent,) was of opinion that it was not a case which could be transferred to another county under that act. (See, also, *Alexander v. Wise*, May term, 1844.)

BRENT v. BRASHEARS.

The marshal may justify appearance-bail at the second term after exception taken at the rules. *Quare?*

THE writ was returnable to November term, 1811. The plaintiff excepted to the appearance-bail at the first rules in January, 1812. At April rules there was a common order against the defendant and bail. At May rules the office judgment was confirmed. No motion was made at July term, 1812, for judgment against the marshal, but *nil debet* was joined for the surety. At this term, (November, 1812,) the marshal offers to justify the bail.

Mr. Ramsay and *Mr. W. Herbert* objected; contending that the marshal is fixed, because all questions as to the sufficiency of bail are to be decided by the court at the first term after exception taken. *Virginia Law*, 12 December, 1792, § 27, p. 78.

Mr. N. Herbert, and *Mr. Taylor*, for the defendant. There can be no judgment against the marshal, until the Court has decided the bail to be insufficient. The plaintiff must follow up his exception, in the office, by a motion to the Court at the next succeeding term.

The COURT (THURSTON, J., absent,) was of opinion, that the marshal might now justify the bail if he would; but doubted whether he was now bound to do so, the plaintiff having omitted to have the question of sufficiency decided at the last term.

NOTE. *Mr. E. J. Lee* afterward showed the Court a letter from Judge Lyons, dated August 12th, 1800, in which he says: "The plaintiff has a right to object to the sufficiency of the bail in the office, and the clerk has no right to determine it; nor can he admit an appearance in such cases, without the consent of the plaintiff; neither should the Court inquire into it, unless the defendant moves to set aside the judgment obtained in the office at the next succeeding term. Such has been the practice, and I think the law warrants it."

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1812, AT WASHINGTON.

WILLIAMS v. CRAVEN.

If a defendant arrested upon a *capias ad respondendum* be discharged under the insolvent act, before the return of the writ, and fails to appear, the marshal cannot be amerced.

THE marshal, having returned *cepi*, discharged under the insolvent law, upon a *capias ad respondendum*, and no appearance having been entered for the defendant, the plaintiff moved to amerce the marshal for not bringing him in.

THE COURT (*nem. con.*) said the marshal could not be amerced. The law had not provided the means of compelling an appearance.

UNITED STATES v. JAMES A. PORTER.

Two or more counts for misdemeanor may be joined in one indictment.

The person defrauded is a competent witness for the prosecution, upon an indictment for the fraud.

Upon an indictment for *barratry*, no evidence can be given of specific acts, without notice.

Notice given after the commencement of the trial, is too late.

A witness is incompetent, who has been convicted of a conspiracy to defraud the creditors of an insolvent debtor.

A grand juror may be required to testify as to the evidence given before the grand jury.

The Act of Congress of 1790, limiting prosecutions for misdemeanor to two years, is applicable to common law-misdemeanors in the District of Columbia.

Fraud is not indictable, unless it concern the public, or be committed by false tokens, or false pretences.

The Court will strike an attorney from the roll, for malpractice, although it be not indictable.

THE defendant was an attorney of this court. The indictment contained five counts. 1st. For *barratry*; 2d, 3d and 4th, for being a common cheat and swindler, and fraudulently getting into his possession the property of his client, Jenkins; and 5th, for conspiracy with one McCutchen, to defraud McCutchen's creditors, by means of his discharge under the insolvent law.

Mr. F. S. Key, for the traverser, moved the Court to quash the indictment, on the ground that it contained various counts requiring different judgments. *Young v. Rex*, 3 T. R. 98, 101, 106. Although this is not a good ground for arresting the judgment, it is good ground for quashing the indictment. The judgment for barratry, is fine and imprisonment, and incapacity to pursue his profession. Upon the counts for swindling, if the offences come under the statutes of 32 H. 8, c. 1, of false tokens, or 30 Geo. 2, of false pretences, they may be punished by fine, imprisonment, or pillory, or whipping, or transportation, or other corporal punishment, except death; and upon the count for conspiracy, there would be a villanous judgment. He also contended that the 2d, 3d, and 4th counts ought to be quashed, because they charged only a civil injury, not a public offence. A mere falsehood, or simple fraud, is not indictable. There must be a false token, or a false pretence. They charge that the traverser, under the pretence of being the attorney of Jenkins, fraudulently extorted and obtained the property mentioned. That was not a false pretence, for he was his attorney.

The indictment must set forth the pretence, and aver it to be false. No fraud is indictable at common law, unless it be of a public nature, and effected by means which a prudent and intelligent man could not avoid. 4 Bl. Com. 134; 1 Hawk. 193, ch. 73, § 8; *The King v. Sara*, 6 T. R. 565; East's Cr. Law, 816; *Rex v. Wheatley*, 2 Burr. 1128; 2 Hale's H. P. C. 182, 184; 2 Hawk. (fol. ed.) 226, c. 25, § 59; 1 Hale, 668; Tremaine's P. C. 104; *Regina v. Daniel*, 1 Salk. 380; *People v. Babcock*, 9 Johns. 201; *J'Anson v. Stuart*, 1 T. R. 753; *The King v. Osborne*, 3 Burr. 1697.

If an indictment for an offence, which was an offence at common law, concludes *contra formam statuti*, but the case is not brought, by the indictment, within the statute, it shall be quashed, and the party will not be put to answer it as an offence at common law. 2 Hale, 171.

Mr. Jones, contra. It is not a matter of discretion with the Court to quash an indictment. The only authority cited is the *dictum* of Judge Buller, in *Young v. Rex*, 3 T. R. 98.

There is no rule which prohibits the joinder of two counts for misdemeanor in one indictment. The judgments on these counts would not be inconsistent. The Court may remove an attorney from practice upon conviction of any offence. But if the Court has a discretion to quash this indictment, they will not, when the facts charged touch the character of one of its officers, who may be removed upon proof of those facts, although they should not amount to a crime in legal acceptance. But the Court has no

discretion to quash the indictment, unless it plainly appears that no judgment can follow conviction. The opposite counsel have mistaken the nature of the indictment. It is not under the statute of false tokens, or false pretences; it is for being a common *barrator*, and a common cheat and swindler.

The COURT (FITZHUGH, J., absent,) quashed the 3d and 4th counts, but refused to quash the 2d, as they deemed it important to ascertain the truth of the charges against the traverser, who was an attorney of the court.

Upon the trial, *Mr. Jones*, for the United States, offered to examine Jenkins as a witness.

Mr. Key, for the traverser, objected that he was the person supposed to be cheated, and had suits now pending against the traverser for the same property of which he is supposed by the indictment to have been cheated by the traverser. No witness can be permitted to invalidate an instrument signed by himself. *Walton v. Shelly*, 1 T. R. 296. Nor can the person whose name is supposed to have been forged, or whose property may be prejudiced by the forgery, be permitted to prove it by his own testimony. 2 Hawk. 433, B. 2, c. 46, § 21. Nor can the person cheated be a witness to prove the cheat. *Rex v. Whiting*, 1 Ld. Raym. 396; *M'Nally*, 105, 124. So in *United States v. Marvell* for bigamy, at December term, 1810, (1 Cranch, C. C. 605,) the Court rejected the testimony of a witness, called to prove the first marriage, and who had a suit depending against the prisoner for goods furnished to his first wife.

Mr. Jones, *contra*. The case of *Walton v. Shelly*, has been overruled by *Jordaine v. Lashbrooke*, 7 T. R. 601; and the rule, as to interest, is that if it be not a necessary and certain interest, it does not disqualify the witness. The objection is generally to his credit. The case of forgery is an exception to the general rule. *Peake*, L. E. 93, 94, 95; *Abrahams v. Burr*, 4 Burr. 2255; *Smith v. Pragers*, 7 T. R. 60; *Bent v. Baker*, 3 T. R. 27.

Mr. Key, in reply. There is no case overruling that of *Rex v. Whiting*. In the cases cited there was no civil suit pending. 1 *M'Nally*, 106, 107.

The COURT (FITZHUGH, J., absent,) was of opinion that Jenkins was a competent witness, and that the objection went only to his credit.

Mr. Jones, for the United States, then offered evidence upon the first count, which charged the defendant as a common barrator.

Mr. Key objected that no evidence can be given of specific acts of barratry, without notice.

Mr. Jones then offered in evidence an agreement between the defendant and one Thomas Herty to commit barratry, and a letter, as general evidence; not of any specific item.

The COURT said that the agreement and letter were premature evidence, before evidence had been given to any particular act of barratry.

Mr. Jones then offered *Herty* as a witness.

Mr. Key objected that he was incompetent because he had been convicted of a conspiracy to defraud the creditors of *McCutchen*, which is an infamous offence. It is the *crimen falsi*. The infamy is in the offence, not in the punishment. 1 Hawk. 178, 193, folio edition, c. 72; 1 M'Nally, 206; 1 Hale, 306; Peake, L. E. 86; *Chater v. Hawkins*, 3 Lev. 426; *Rex v. Ford*, 2 Salk. 690.

Mr. Jones, in reply. No common-law offence is sufficiently infamous to exclude a witness, unless it be one to which the common law has annexed an infamous punishment. The *crimen falsi*, is only where forgery or perjury is charged; or a conspiracy to charge a person with forgery or perjury.

The COURT, however, was of opinion that *Herty* was not a competent witness. The conviction and judgment upon the indictment for conspiracy with *McCutchen* to defraud his creditors by secreting property on taking the oath of an insolvent debtor, is a conviction of an infamous crime. It partakes of the *crimen falsi*.

Mr. Jones then offered to examine *Mr. S. H. Smith*, the foreman of the grand jury, to prove what the defendant stated and confessed before the grand jury on an examination before them.

Mr. Key objected that the grand jurors are bound to secrecy by their oath. 1 M'Nally, 253; *Burr's Trial*, reported by Carpenter, vol. 3, p. 289.

The COURT (*nem. con.*) overruled the objection.

Mr. Jones then offered the defendant's receipt for papers, &c. from *Jenkins*, dated more than two years before the indictment.

Mr. Key and *Mr. Caldwell*, for the defendant, objected the Act of Congress, of 30th of April, 1790, § 32, which limits the prosecution to two years, and contended that this paper was not evidence upon that part of the indictment which avers that he fraudulently obtained possession of *Jenkins's* property.

But the COURT (*nem. con.*) said that the gist of the indictment was the fraudulent application of, and refusal to account for, the property; and permitted the paper to be read.

Mr. Key then objected to evidence of acts of fraud committed more than two years before the finding of the indictment, and relied upon the 32d section of the Act of Congress of April 30, 1790, "for the punishment of certain crimes against the United States." [1 Stat. at Large, 112.]

Mr. Jones, contra. The Act of Congress does not apply to

United States v. Moxley.

this case. It relates only to cases within the jurisdiction of the Circuit Courts of the United States, and punishable by those courts. It does not apply to jurisdictions created subsequent to that act, nor to any offences but those which are created by the laws of the United States. The Courts of the United States have no common-law criminal jurisdiction.

The COURT (FITZHUGH, J., absent,) was clearly of opinion that the Act of Congress of the 30th of April, 1790, § 32, applied to the case; and instructed the jury that they could not find the defendant guilty upon evidence of acts of fraud committed more than two years before the finding of the indictment.

After the trial had occupied one day, a notice of the particular acts of barratry intended to be proved was delivered to the defendant's wife.

The COURT said it was not reasonable notice. 1 Hawk. c. 81, § 13; *J'Anson v. Stuart*, 1 T. R. 754.

Verdict, guilty, on the 2d count. The Attorney for the United States, entered a *nolle prosequi* upon the other counts.

The COURT (FITZHUGH, J., doubting,) upon the defendant's motion arrested the judgment, upon the ground that the fraud was not of a public nature; and not perpetrated by means of false tokens, or false pretences; but they ordered the defendant's name to be stricken from the roll of attorneys of this Court.

 UNITED STATES v. MOXLEY.

Upon an indictment for taking usury, the borrower is a competent witness for the prosecution, if he has paid the money, and be not the informer.

INDICTMENT for taking usury from William Calder.

The Attorney of the United States, offered William Calder as a witness.

Mr. Morsell and *Mr. Key*, for the defendant, objected that he was interested. First, because he is the informer, and entitled to half the penalty, under the Maryland law of September, 1704, c. 69, § 3; and secondly, because he is offered to invalidate his own contract. If he has paid the money he may recover it back; if he has not paid it he is interested to set aside the contract. 1 M'Nally, 105; *The King v. Whiting*, 1 Salk. 283; S. C. 1 Ld. Raym. 396.

The COURT (FITZHUGH, J., absent,) was of opinion that the witness was competent; having declared upon the *voir dire*, that he was not interested; and had paid the money, and it being admitted that he was not a voluntary informer.

Dobbin v. Foyles.

UNITED STATES v. HAUKEY.

A person who steals goods in Maryland and brings them here, is guilty of larceny here. *Quere.*

INDICTMENT for stealing a horse.

The horse was stolen in Maryland and brought by the prisoner into this county.

CRANCH, C. J., stated that this Court had decided that such a case was cognizable here. *United States v. Frank Tolson*, (1 Cranch, C. C. 269.) (See *United States v. Mason*, at Alexandria, May term, 1823, *post.*)

DOBBIN v. FOYLES.

Upon a count charging negligence of the defendant and his servants, it is sufficient to prove negligence of the servant.

A count for injuring the plaintiff's mare by negligence, and a count upon a promise to return the mare safe, may be joined; and advantage can only be taken of the misjoinder (if it be one) by special demurrer.

ACTION ON THE CASE, upon the loan of a mare by the plaintiff to the defendant, who injured her by bad treatment and negligence. The declaration averred the negligence and bad treatment to have been by the defendant and his servants.

Mr. F. S. Key, for the defendant, prayed the Court to instruct the jury that they must be satisfied, by the evidence, that the negligence was that of the defendant himself, and that the negligence of the servants is not sufficient; and cited the case of *Dunlop v. Munroe*, in this Court, 1 Cranch, C. C. 536.

But the COURT (*nem. con.*) refused.

The declaration contained two counts. The first count stated that the plaintiff loaned a mare to the defendant, at his request, who promised to treat her well and return her safe, but by negligence and mismanagement of the defendant and his servants, she was injured, &c. The second count stated that the plaintiff loaned the mare to the defendant at his request, and he promised to return her safe but did not.

The defendant pleaded not guilty, generally, and the verdict being against him, he moved in arrest of judgment, because the counts are inconsistent and require separate pleas and judgments.

The COURT, however, refused to arrest the judgment, being of opinion that both counts were good, and if not strictly proper to be joined, that the remedy was by special demurrer. See 4 Bac. Ab. 11, 12; and *White v. Risden*, Cro. Car. 20.

United States *v.* Negro Patrick.

BIRCH *v.* GITTINGS.

If A replevies from B, who had replevied from A, the Court will quash the 2d replevin. and, upon a motion made for a return of the property in the first replevin, will order it to remain with the person who appears to have the right of possession, according to the Maryland law, of 1785, c. 80, § 14.

BIRCH replevied from Gittings, and Gittings from Birch.

The COURT quashed the 2d replevin and ordered the possession to remain with Gittings, he having the right of possession when Birch replevied. See Maryland law, 1785, c. 80, § 14.

NICHOLLS *v.* JOHNS.

Security for costs.

THE plaintiff having removed his family into the county of Washington, the rule for security for costs was stricken out, by leave of the Court.

PALMER, for the use of Glover, *v.* CASSIN.

The declarations of the assignor, made after the assignment of a chose in action, will not be received to defeat the action brought in his name.

THE defendant pleaded the statute of gaming, and offered Palmer's confessions in evidence — confessions made subsequent to the assignment, and since the suit brought.

The COURT (*nem. con.*) refused to receive them. Palmer could not release the action and the Court will not suffer him to defeat it by his declarations.

The defendant then confessed judgment.

UNITED STATES *v.* NEGRO PATRICK, a Slave.

An attempt, by a slave, to ravish a white woman is punishable by death.

THE defendant, a slave, was convicted of an attempt to ravish a white woman. The indictment was under the Act of Assembly of Maryland, 1751, c. 14, § 2.

Judgment of death was entered on the 30th of January, 1813, and executed on the 11th of March. The slave was valued by the Court, at 400 dollars, according to the 7th section of the act.

 WATSON v. Bayley.

BEATTY'S ADMINISTRATOR v. VAN NESS, Administrator of Burnes.

The Court will permit the plea of limitations to be filed after the rule-day, upon an affidavit showing it to be a fair defence under the circumstances of the case.

ASSUMPSIT for money had and received, brought under the Act of Maryland, 1791, c. 45, § 5, to try the title to some city lots claimed by the plaintiff's intestate.

The defendant, after the rule-day, moved to file the plea of limitations, upon his affidavit that he ordered the plea to be filed by his attorney before the rule-day. That his attorney was absent attending the trial of Wilkinson; that Burnes had been in possession more than twenty years, &c.

The COURT (*nem. con.*) upon this affidavit, permitted the plea to be filed, considering it a fair defence under the circumstances.

 THOMPSON'S ADMINISTRATOR v. AFFLICK'S ADMINISTRATOR.

A surety in an administration bond is a competent witness for the administrator.

Mr. Caldwell, for the defendant, offered to examine as witness for the defendant, Charles Glover, who was a surety in the defendant's administration bond.

Mr. Key, for the plaintiff, objected that the witness was interested.

But the COURT overruled the objection.

 WATSON v. BAYLEY.

The statute of gaming may be given in evidence, upon *non assumpsit*, without notice.

ASSUMPSIT, against the maker of a promissory note.

Upon *non assumpsit* the defendant offered to prove that the note was given for money won at play.

The COURT (FITZHUGH, J., absent,) permitted the evidence to be given, without notice.

LEWIS *et al.* v. SPALDING.

In an action upon the case for maliciously conspiring to deprive the plaintiffs of their slave, it is necessary for them to prove malice in the defendant. And it is competent for the defendant to show probable cause, and the want of malice.

THIS was an action upon the case charging that the defendant, "unlawfully, wickedly, and maliciously," conspired with divers ill-disposed persons to the plaintiffs unknown, to kidnap and carry off the slave of the plaintiffs, then in their peaceable possession; and in pursuance of such conspiracy, falsely and maliciously, by false pretences, procured a warrant to have the slave apprehended and delivered to the defendant; and hired persons to seize and carry away the slave out of the peaceable possession of the plaintiffs, for the lucre and gain of the defendant and to defraud the plaintiffs; and attempted to bribe persons to seize and carry away the slave, he the defendant thereby wickedly and maliciously keeping the plaintiffs in continual alarm and danger of having their said slave taken from them by force or fraud: by means of which unlawful conspiracy the plaintiffs were put to great labor, expense, and trouble, in watching and protecting their said slave, and were deprived of his labor and hire, &c.

The COURT (THRUSTON, J., *contra*,) was of opinion that it was necessary for the plaintiffs to prove malice in the defendant; and that it was competent for the defendant to show probable cause, by showing color of title, &c., and to disprove malice.

UNITED STATES v. WALTER WRIGHT.

Possession of forged bank-notes, with intent to utter them as true, is not an indictable offence.

INDICTMENT for knowingly having in his possession forged bank-notes with intent to utter them as true.

Mr. Wallach and *Mr. Law*, for the defendant, moved the Court to quash the indictment; because,

1. It is only an intent to commit a crime, which intent is not indictable. *The King v. Higgins*, 2 East, 5; 4 Bl. Com. 21; Stat. 41 Geo. 3, c. 39; East, C. L. 881.

2. It does not charge an unlawful intent to injure any person. Nothing can be inferred. At common law it is no crime simply to make a false bank-note unless some person be injured. 1 Hawk. c. 70, § 11; *Rex v. Wheatley*, 2 Burr. 1127; *Rex v. Munoz*, 2 Str. 1127.

3. It does not set forth the notes in *hæc verba*. *Mason's case*, East, C. L. 975 ; *Commonwealth v. Morse*, 2 Mass. 137.

Mr. Jones, contra. An inchoate act towards the consummation of a crime is indictable. *The King v. Higgins*, 2 East's Rep. 5. There is a form of such an indictment in *Crown Circuit Companion*, p. 286, for having counterfeit money in his possession with intent to utter it. This Court in the case of *The United States v. Ray & Williams*, (1 Cranch, C. C. 178,) decided that in an indictment for forgery, it is not necessary to set forth the forged instrument in *hæc verba*.

The Court having some doubt, refused to quash the indictment ; but after verdict, arrested the judgment.

CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1813, AT ALEXANDRIA.

MORGAN v. EVANS.

The defendant has a right to plead the statute of limitations, at the first term after office judgment: it being an issuable plea.

Mr. Taylor, for the defendant, at the last term, which was the first term after office-judgment, moved to plead the statute of limitations, and cited the 28th section of the Virginia Statute, of 12th December, 1792, which enacts that an office-judgment may be set aside if the defendant, "at the succeeding court, shall plead to issue immediately." *Downman v. Downman*, 1 Wash. 28; 1 Chitty on Pleading, 505, 506; *Rucker v. Hannay*, 3 T. R. 124; *Maddox v. Holmes*, 1 B. & P. 228; *Willet v. Atterton*, 1 W. Bl. 35, and *Stadholme v. Hodgson*, 2 T. R. 390.

The COURT (*nem. con.*) having taken time to consider, admitted the plea, being of opinion that, as it was an issuable plea, and offered at the first term after office judgment, the Court had no discretion.

UNITED STATES v. ELIJAH CHENAULT.

Laboring to exact fees from one party after having received them from another is not extortion, and whether it is an indictable offence, *quare*. The contents of a warrant cannot be proved without producing it, or accounting satisfactorily for its non-production.

THIS was an indictment for laboring to exact fees from the plaintiff, after having received them from the defendant, on a warrant before a justice of the peace in the case of *Carlin v. Weston*.

 Patton v. Janney.

The COURT refused to instruct the jury that the offence charged was not indictable ; but told them it was not extortion.

The COURT also refused to suffer parol evidence to be given of the contents of the warrant without producing it, or accounting satisfactorily for its non-production.

PATTON v. JANNEY.
SAME v. TAYLOR *et al.*

Witnesses may be removed while others are examined.

One joint defendant, in an action of *assumpsit*, cannot confess judgment so as to enable him to testify in behalf of the other defendants.

Information, received by an agent of the insured, of the loss of the property, before insurance effected, will not vacate the policy, unless that agent is the agent who obtains the insurance, or gives the information to the person who obtains it.

If several actions against several underwriters upon the same policy, are submitted to the same jury at the same time, and the jury find verdicts against some of them but wish to reconsider as to the others ; those underwriters against whom the verdicts are found cannot be examined as witnesses for the others.

THESE were actions of *assumpsit* against several underwriters upon the same policy of insurance on the schooner *Dorchester*, from *Antigua* to *Alexandria*.

The counsel for the defendants requested that Captain Roberts (who it was supposed was a witness for the plaintiffs, and would give a different testimony from that contained in a deposition of Mr. Dykes, as upon a former trial he had differed in some particulars,) might be removed out of hearing at the time of reading that deposition, which was allowed by the COURT, it not being opposed by the counsel for the plaintiff. (THRUSTON, J., absent, and CRANCH, C. J., doubting, as to the correctness of the practice.)

Mr. E. J. Lee and Mr. Taylor, for the defendants, offered to examine John Young as a witness. He was a joint defendant with Mr. Marsteller in a suit on some policy then depending, and the judgment in which was, by agreement, to depend on the verdict in this case. Mr. Young offered to confess judgment in that suit, waiving the joint plea of *non assumpsit* as far as it was pleaded on his part.

But the COURT (THRUSTON, J., absent,) was of opinion that as the suit against Marsteller and Young was joint, and they had pleaded jointly, judgment could not be entered separately against one ; and refused to order the judgment to be entered ; but permitted an entry to be made on the record that Mr. Young came and offered to confess judgment ; but they rejected Young as a witness for the defendant ; for as judgment cannot be rendered against Young until it is rendered against Marsteller ; and

Miller v. Evans.

as the judgment against Marsteller is, by agreement, to depend on the event of the present suit, and as the verdict in the present case may be affected by the testimony of Young, if he should be permitted to testify, he is directly interested.

Mr. E. J. Lee, for the defendants, then contended that if Dykes was the general agent of the plaintiff, and had information of the loss soon enough to have communicated it to the plaintiff, so as to prevent the insurance, and failed to do so, the plaintiff was bound by the knowledge and negligence of his said agent, and the policy is void.

Mr. Swann, contra. The knowledge of the agent which can affect the policy, must be the knowledge of an agent concerned in obtaining the insurance or in giving the information upon which it is obtained; but the mere neglect of the agent at Norfolk to give the information by the next mail, did not vitiate the policy.

And of that opinion was the COURT, (THRUSTON, J., absent.)

The jury found verdicts against the defendants in two of the cases, but wished to reconsider as to the other cases. *Mr. Lee*, for the defendants, proposed to examine the defendants, against whom the verdicts were found, as witnesses for the other defendants; but the Court said it was not consistent with the practice of the Court: all the causes having been submitted to the jury at the same time.

Bills of exception were taken by the defendants' counsel, but no writ of error was prosecuted.



MILLER v. EVANS.

In an action upon a bond, payable by instalments, the jury may, and ought to, presume payment of any instalment payable more than twenty years before the commencement of the suit, and may presume payment of an instalment payable nineteen years and ten months before suit brought.

DEBT, upon a bond payable by instalments. Nineteen years and ten months had elapsed since the last instalment became payable, and another instalment had become payable more than twenty years before the suit was brought.

The COURT (*nem. con.*) instructed the jury that as to the instalment due more than twenty years they ought to presume, and as to the other, they might presume, payment.

Mr. N. Herbert, for the plaintiff. *Mr. Taylor*, for the defendant.

United States v. Yeaton.

HOUSE v. CASH.

When notice is given that a deposition will be taken between certain hours, it is not necessary to wait till the last hour.

Mr. Taylor, for the defendant, objected to a deposition, because the defendant attended at three o'clock, and the deposition had been taken before that hour; the notice being that it would be taken between the hours of 11, A. M. and 5, P. M. He contended that the plaintiff was bound to keep open the examination during the whole time.

But the COURT (*THRUSTON*, J., absent,) overruled the objection.

RIDDLE v. MOTT.

Demand, and notice to the indorser, are not necessary in Virginia, if the maker was so insolvent that they could be of no use to the defendant.

ASSUMPSIT against the defendant as indorser of Patrick Ramsay's note.

The COURT instructed the jury that, under the law of Virginia, it was not necessary to prove a demand upon Ramsay, and notice to the defendant, if they should be satisfied by the evidence, that Ramsay was so insolvent, when the note became payable, (April, 1808,) that such demand and notice would not have been a benefit to the defendant. *Quære.*

UNITED STATES v. YEATON.

Upon the seizure and condemnation of a vessel for violation of the Act of Congress of the 28th of February, 1806, "to suspend the commercial intercourse between the United States and certain parts of the island of St. Domingo," the United States are interested only in one half of the forfeiture.

THE schooner *Betsey* and *Charlotte*, owned by the defendant, was condemned and sold for trading to St. Domingo, contrary to the act of 28th February, 1806. [2 Stat. at Large, 351.] The defendant became the purchaser at that sale, and gave his note for the purchase-money, upon which note the United States recovered judgment and issued execution.

In the mean time the President of the United States remitted the forfeiture "as far forth as the United States were interested

therein," and *Mr. Jones*, the District Attorney, indorsed a memorandum upon the execution, that it was to be discharged by the payment of one half of the amount of the debt, and interest thereon and costs.

The defendant obtained a rule on the District Attorney to show cause why the execution should not be quashed.

Mr. C. Simms, for the defendant, contended that the whole forfeiture accrued to the United States, and could only be recovered in the name of the United States, and therefore the whole was remitted. That the subsequent distribution of a moiety among the revenue officers, was a matter between them and the United States. The whole forfeiture was under the control of the United States, until it was actually recovered, and, until recovered, the rights of the revenue officers did not accrue. The United States had a right to interpose and prevent the recovery.

The COURT, however, was of opinion (*nem. con.*) that the United States were interested only in one half of the forfeiture, and that only one half was remitted.

CIRCUIT COURT OF THE UNITED STATES.

JUNE TERM, 1813, AT WASHINGTON.

BURNS *v.* SIM'S BAIL.

If the principal has been discharged under the insolvent law of Maryland, the bail will be discharged.

Upon a motion to exonerate the bail, the Court will not receive evidence of fraud in the principal in contracting the debt.

Mr. Law, for the defendant, offered evidence of the discharge of the principal under the insolvent act of Maryland, and prayed an *exoneretur* of the bail.

Mr. Caldwell, for the plaintiff, objected, and alleged fraud of the principal in contracting the debt with a view to insolvency.

The COURT (THRUSTON, J., absent,) was of opinion that fraud could not be examined into in this way, but that the certificate of discharge was conclusive, unless set aside in the manner provided for by the law of Maryland.

UNITED STATES *v.* MINTA BUTLER, a free Black Woman.

A slave is not a competent witness against a free black person, in a capital case.

But free blacks, unless they are in a state of servitude by law, are competent witnesses against free blacks.

INDICTMENT for arson in burning the stable of Hieronimus.

Mr. Jones, for the United States, offered a slave as a witness.

Mr. Key, for the defendant, objected that he was not a competent witness against a free negro in a capital case.

Mr. Jones admitted the objection to be good.

Mr. Key then objected to free negroes as witnesses against the prisoner, and cited the Maryland Act of 1717, c. 13, § 3.

But the COURT (FITZHUGH, J., absent,) said that only free negroes, during their term of servitude by law, or mulattoes, during their term of servitude by law, were excluded by that act.

UNDERWOOD'S ADMINISTRATOR v. HUDDLESTONE.

The contents of a written notice cannot be given in evidence, unless notice has been given to the party to produce it.

ASSUMPSIT against the indorser of Roddy's note. The notary testified that he gave notice by letter.

Mr. Law, for the defendant, objected to evidence of its contents, because the defendant had not been called upon to produce the letter, and cited Chitty, 210; 1 Peake, L. E. 112; 2 Ib. 221; 7 East, 385; *Shaw v. Markham*, Peake, N. P. 165.

Mr. Jones, contra. The practice has always been otherwise. *Sanderson v. Judge*, 2 H. Bl. 509.

The COURT (*nem. con.*) refused to permit evidence to be given of the contents of the letter, because the plaintiff had not given notice to the defendant to produce it before the trial, and refused to allow the plaintiff now to give the notice.

Verdict for the defendant.

New trial granted on payment of costs. (*Bank Washington v. Kurtz, post.*)



UNITED STATES v. NEGRO CHARLES.

A confession, made under the influence of hope or fear, cannot be given in evidence. Grand jurors may testify as to the confessions made by the prisoner before them, upon oath, when under examination as a witness against another person. Subsequent confessions, after having confessed under the influence of hope or fear, cannot be given in evidence.

INDICTMENT for arson.

Mr. Lufborough, the magistrate before whom the prisoner was brought, told him there was evidence enough to commit him at all events, and therefore he had better confess the whole truth, and that probably he would fare the better for it.

The COURT (*nem. con.*) refused to suffer the confession to be given in evidence against the prisoner. Peake, L. E. 13; M'Nally, 42.

Mr. Jones, for the United States, then called some of the grand jurors to testify as to what he swore when examined by the grand jury as a witness against negro Jacob Bruce.

Mr. Key and *Mr. Morsell*, objected, that what he swore cannot be given in evidence against him. M'Nally, 47.

But the COURT overruled the objection.

Mr. Rapine, one of the grand jurors, testified that the prisoner was not told that he need not answer any question tending to criminate himself.

Mr. Key objected to the evidence for want of such caution to the prisoner.

But the COURT said that the prisoner was presumed to know the law in his favor, without such caution.

Doctor Ott testified, that on the day after the examination of the prisoner by Mr. Lufborough, he was examined by Doctor Ott and Mr. Lufborough as a witness against Jacob Bruce ; and after being told that if what he had before stated was not true, he might retract, made the same declaration.

Mr. Key objected, that the prisoner might have been influenced by the hope and fear excited by Mr. Lufborough on the former day. M'Nally, 43.

But the COURT overruled the objection.

The jury found the prisoner guilty, but recommended him to mercy on account of his youth and apparent candor.

On the next day the counsel for the prisoner moved for a new trial, because the confessions of the prisoner, made upon oath, in his examination before the grand jury as a witness against negro Jacob Bruce, were permitted to be given in evidence against him by the testimony of grand jurors.

Mr. Key, for the prisoner. There is no case in the books in which a grand juror has been permitted to give such testimony. 12 Vin. Ab. tit. Evidence, H. pl. 20, 38. Judge Foster refused to suffer a grand juror to disclose the evidence, because sworn to keep secret, &c. So the clerk of the grand jury shall not be allowed to reveal that which was given in evidence before the inquest. M'Nally, 253.

Mr. Jones, contra. The rule of law that a witness is not bound to answer any question tending to criminate himself, would be useless if his declarations upon oath could not be given in evidence against him. The same rule applies to an examination before a grand jury. M'Nally, 246, 250, 253, 254. General Wilkinson, in Burr's trial, was protected by the rule from testifying any thing which might criminate himself ; and grand jurors were sworn to testify what General Wilkinson testified before them, to discredit his oath in court. 3 Burr's Trial, (by Carpenter) p. 289. The grand juror's oath only prevents a disclosure of confidential communications by the public functionaries, or by a grand juror to his fellow jurors ; it does not prevent him from disclosing when called upon in a judicial manner. The grand jury may hear evidence at the bar, (2 Hale, 159, 160,) and it is the practice of the General Court in Virginia, in cases of difficulty before the

 Sanford v. Boyd.

grand jury, to call them to the bar and have witnesses examined, and to instruct them upon the evidence, as in trials at bar. The grand jury are only to keep secret the king's counsel.

Mr. Key, in reply. The reason of the rule is the confidential nature of the communication. It is on the same reason that the magistrate, or counsel, shall not disclose what is committed to them. The oath of the grand juror forbids him to disclose any thing. It is all "the counsel of the United States." It is a high misdemeanor in a grand juror to inform the accused of the evidence which has been given against him before the grand jury. 4 Bl. Com. 126, Tucker's note. The oath in Virginia is different, and that is the reason given by the Chief Justice, in Burr's case, for permitting Mr. Tazewell, one of the grand jurors, to be examined. The case of a popish priest, is a case of private confidence only; it is not imposed by the law of the land.

If the prisoner has been once induced to confess, by a promise or threat, it is the common practice to reject a subsequent confession of the same, or like facts. In one case it was admitted by Buller, J., but he observed that there must be very strong evidence of an explicit warning by the magistrate not to rely on any expected favor on that account; and it ought most clearly to appear that the prisoner thoroughly understood such warning before his subsequent confession can be given in evidence. 2 East, Cr. L. 658, c. 16, § 94.

The COURT (THURSTON, J., absent,) granted a new trial because the first confession of the prisoner had been made under the impression of fear and hope excited by the observations of the magistrate, (Mr. Lufborough.) And no subsequent confession of the same facts ought to be given against him, according to the law as stated in 2 East, Cr. L. c. 16, § 94.

Upon the new trial he was convicted, and pardoned by the President. See the case of *United States v. Jacob Bruce*, *post*.

WILLIAM SANFORD v. WASHINGTON BOYD.

A sail-maker at the Washington navy-yard, appointed by a warrant under the hand of the Secretary of the Navy and seal of the department, is an officer of the United States and exempt from militia duty.

REFLEVIN, for goods taken by distress for militia fines.

Mr. Jones, for the plaintiff. Sanford was appointed sail-maker for the navy-yard at Washington, by a warrant under the hand of the Secretary of the Navy and the seal of the department, and is therefore an officer of the government of the United States, and

exempted from militia duties, by the second section of the Act of Congress of the 8th of May, 1792, [1 Stat. at Large, 271,] *Wise v. Withers*, 3 Cranch, 331.

Mr. Caldwell, contrà. The case of *Wise v. Withers* does not decide this. *Wise* was a judicial officer and expressly excepted. The act of the 27th of March, 1804, [2 Stat. at Large, 297,] authorizes the President to attach, to the navy-yard, a sail-maker; but this does not authorize the Secretary to make the appointment by a warrant under his hand and the seal of the department only. He is, therefore, not an officer, either judicial or executive, of the government of the United States.

Judgment for the plaintiff.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1813, AT ALEXANDRIA.

NOTE. By the Act of Congress of the 24th of June, 1812, § 12, [2 Stat. at Large, 758,] the Circuit Court is directed to be held at Alexandria, on the 3d Monday in April, and the 4th Monday in November, annually.

CONWAY'S EXECUTORS v. SHERRON.

The taking possession, and cultivating of the land by the vendee, takes the sale out of the Statute of Frauds.

BILL in equity by the executors of the vendor for a specific execution of a sale of land at auction; averring part performance.

Plea, Statute of Frauds.

Mr. E. J. Lee, for the plaintiffs, contended — 1st. That the statute does not apply to goods sold at auction; and that there is no reason for a difference between lands and goods in that respect. It is not necessary that the auctioneer's authority should be in writing. *Sugden*, Law of Vendors, 57; *Simon v. Molivos*, 3 Burr. 1921; S. C., W. Bl. 599; *Payne v. Cave*, 3 T. R. 148; *Trecothick v. Coles*, 9 Ves. 234, 249; *Powell on Contracts*, 272; *Waller v. Hender & Cox*, 5 Viner, 524.

The auctioneer is a public officer, like a sheriff or a master in chancery, &c. Law of Virginia, December 22d, 1796; *Bibb v. Duvall*, 3 Call's Rep. 362.

2d. That the agreement was executed in part by the plaintiffs' suffering the defendant to take possession and enjoy the rents and profits, &c., which takes the case out of the statute. *Bell v. Andrews*, 4 Dal. 152; *Sugden*, 72; 1 *Vernon*, 363; 1 *Vez.* 220, 297; 4 *Ves. Jr.* 720, and *Argenbright v. Campbell*, 3 *Hen. & Mun.* 161.

The COURT (*FITZHUGH, J.*, not sitting,) overruled the plea, on the ground of part execution of the agreement; and at November term, 1814, upon final hearing, decreed a specific performance.

 Custiss v. The Georgetown and Alexandria Turnpike Company.

CUSTISS v. THE GEORGETOWN AND ALEXANDRIA TURNPIKE COMPANY.

In an action of debt founded upon an inquisition taken under the charter of the Georgetown and Alexandria Turnpike Company, of the 3d of March, 1809, the defendant, upon the plea of *nil debet*, may give evidence of fraud, or partiality, or irregularity on the part of the jurors, who took the inquest. But the jurors themselves cannot be examined as witnesses of each other's conduct. It is necessary that all the jurors sworn should agree to the inquest.

DEBT, for \$3000, the damages assessed by an inquisition taken under the Act of Congress of the 3d of March, 1809, [2 Stat. at Large, 539,] incorporating "The President, Directors, and Company of the Georgetown and Alexandria Turnpike Road."

This inquisition had been quashed by the Circuit Court, but their decision was reversed by the Supreme Court of the United States, because the Circuit Court had no jurisdiction of that matter. 6 Cranch, 233. At the last term the defendants demurred to the declaration in the present case, because it contained no *profert* of the inquisition, nor *prout patet per recordum*.

But the COURT overruled the demurrer, and adjudged *nil debet* to be a good plea. Under which plea the defendants now offered evidence of partiality, fraud, and misconduct on the part of jurors upon the inquest.

To this *Mr. E. J. Lee* and *Mr. Swann*, for the plaintiff, objected, that these are facts of which the plaintiff cannot be supposed to be conusant, or to be prepared to controvert. The plea of *nil debet* does not deny the validity of the inquisition.

The COURT, however, (*Thurston, J.*, absent,) permitted the evidence to be given.

The defendants then offered *Mr. Threlkeld*, one of the inquest, as a witness to prove the improper conduct of the other jurors.

But the COURT refused, on the ground of the general policy of refusing to hear the mutual recriminations of jurors.

Mr. Key, for the defendant, then objected that the inquisition should have been assented to by all the jurors who were sworn. Whereas, although it was signed by all who were sworn, (16,) it was agreed to by 12 only.

Mr. E. J. Lee, contra. The act cannot mean that the whole twenty-four should agree. It says there shall be not less than twelve; from which it is to be inferred that if twelve agree, it is sufficient. The Supreme Court said that if the inquisition had been found by eleven jurors it would have been void; implying that if twelve had agreed it would have been good.

The COURT stopped *Mr. Key* from reply, and instructed the

jury that the inquisition was not sufficient in law to support the plaintiff's action; it appearing on the face of the inquisition, and by parol testimony, that all the jurors sworn did not agree thereto, although all signed it.

The plaintiff took a bill of exceptions, but did not prosecute a writ of error.

WELCH v. MANDEVILLE & JAMESSON.

A person for whose benefit an action is brought, but who does not appear to be a party upon the record, nor to be interested in the cause, cannot come in and, in his own name, reply fraud and collusion between the legal plaintiff and defendant to defeat the action; and such a replication is bad upon demurrer.

COVENANT to pay money for land sold to the defendants. The defendants pleaded that in a former suit between the same parties, for the same cause of action, such proceedings were had that "the said James Welch came into court and acknowledged that he would not further prosecute his said suit, and from thence altogether withdraw himself." Whereupon the record states that Allen Prior, for whose use this action is brought, comes and says, &c., in substance, that Welch being indebted to him (Prior) in more than \$8,707.09; and Mandeville and Jamesson being indebted in the sum of \$8,707.09 to Welch, the latter, by an equitable assignment, for a full and valuable consideration, assigned the said \$8,707.09 to the said Prior in discharge of the debt to him, of which Mandeville and Jamesson had notice. That the suit was brought in the name of Welch for the use of Prior, with the knowledge of Mandeville. That the suit was "dismissed agreed," without the authority, knowledge, or consent of Prior, or his attorney; and that Mandeville knew that Welch had no authority from Prior to dismiss the suit. That the dismissal was procured by Mandeville with intent to defraud Prior, and that the entry and judgment thereon were made and entered by covin, collusion, and fraud; and that the said judgment was and is fraudulent.

To this replication the defendant filed a general demurrer.

Mr. E. J. Lee in support of the replication cited 2 Roll. Ab. 46, G.; *Masters v. Miller*, 4 T. R. 341, 343; *Corser v. Craig*, in the Circuit Court of Pennsylvania, 4 Wash. C. C. Rep. M. S. *Bright v. Eynon*, 1 Burr. 395; *Maxwell v. Levi*, 4 Dal. 330, 335; *Simms v. Slacum*, 3 Cranch, 306.

Mr. Swann and Mr. Taylor, *contrà*, contended that the replication could be only by the legal plaintiff; and that a stranger to the record could not intervene and plead that which the legal plaintiff would not be permitted to allege — his own fraud. That the only

Park v. Willis.

remedy which Prior had was to apply to the Court to prevent the *retraxit* at the time it was offered. That to admit Prior's legal right to plead in the cause, is inconsistent with the rule of law that a chose in action is not assignable.

The COURT (THRUSTON, J., absent,) sustained the demurrer to the replication, because it was not made in the name of the legal plaintiff. Reversed. 1 Wheat. 233.

 PARK v. WILLIS.

By the Virginia law of 25th January, 1798, §§ 6 and 7, a master of a vessel is liable to the owner of a slave for his loss, if he takes the slave out of the county of Alexandria, in the District of Columbia, without a written authority from his owner, or a compliance with the other requisites of that act; and a general hiring to the defendant for eleven months, without any limitation as to the nature or place of his employment, is not such a permission as the act requires, although the plaintiff knew that the defendant's occupation was that of a master of a vessel, and the slave was a seaman. The person to whom the slave is hired is not the owner within the meaning of the statute.

THIS was an action on the case founded upon the Virginia laws of 17th December, 1792, p. 192, § 50, and 25th January, 1798, p. 374, §§ 6 and 7; by the first of which it is enacted that no master of a vessel shall transport out of the Commonwealth any servant or slave without the consent or permission of the person to whom such servant or slave doth of right belong," upon penalty of \$150 for a servant, and \$300 for a slave; one moiety to the Commonwealth and the other to the owner; and such master shall moreover be liable to the suit of the party grieved, at the common law for his damages.

By the act of 25th January, 1798, it is enacted, that no master of a vessel shall transport, &c., "any negro or mulatto," out of the Commonwealth, on any pretext whatsoever, until he shall have produced him before some magistrate, &c., and lodged a description of the negro or mulatto, and a declaration of the place to which he is bound, and a certificate of freedom, &c., or the written direction of the owner of the negro or mulatto, commanding or permitting such master to carry him out of the Commonwealth;" under penalty of \$500 for every negro or mulatto so carried, &c., to be recovered by action of debt by any person who will sue for the same; and such master shall moreover, be liable to the action of the owner of such negro or mulatto, &c.

The first count stated that on the 25th of December, 1802, the plaintiff was the owner of a negro man slave named Anthony, in the county of Alexandria, of the value of \$500, and the defendant

was then and there the master of a certain vessel called the Hope, of Alexandria; and the defendant, well knowing that the said slave belonged to the plaintiff, did on that day transport the said slave in his said vessel, out of the District of Columbia and out of the Commonwealth of Virginia, to wit, to the city of Philadelphia in the State of Pennsylvania, without the consent of the plaintiff. In consequence of which said transportation the said slave ran away and absconded at the city of Philadelphia, and was totally lost to the plaintiff.

The 2d count stated that the plaintiff was the owner of the slave, and the defendant was master of the vessel, then lying in the river Potomac, adjoining the county of Alexandria. That the defendant well knowing, &c., transported the said slave out of the District of Columbia, and out of the Commonwealth of Virginia, to wit, to the city of Philadelphia, in the State of Pennsylvania, without having produced the said negro slave before any magistrate of the county adjoining which the said vessel lay; and without having lodged with any such magistrate a description of the said negro, his name, probable age, and alleged place of birth, and a declaration of the place or port to which the defendant was bound; and without having produced to any such magistrate any certificate of freedom granted to the said negro, or the written direction of the plaintiff, commanding or permitting him to carry the said slave out of the District of Columbia or Commonwealth of Virginia; in consequence of which said transportation, the said slave absconded and was totally lost to the plaintiff, contrary to the statute in that case made and provided, whereby the plaintiff was injured and sustained damage to the amount of \$700, and therefore he brings suit.

The jury, in a special verdict found the following facts: That the defendant, on the 29th of January, 1802, hired the plaintiff's negro slave Anthony, in Alexandria, in the District of Columbia, by the following written agreement.

"I have, this 29th of January, 1802, hired of James Wilson, agent of James Park, a negro man named Anthony, from this time until the first day of January, 1803, eleven months and two days, for \$110, and to furnish the said negro with every thing necessary except his clothing and taxes; and which sum I promise to pay to the said James Wilson in quarterly payments; as witness my hand and seal this 29th day of January, 1802. Abel Willis. Test. Rob't Conpar, Jr."

They found no restriction as to the defendant's right of employing the slave, or taking him out of the District of Columbia, or State of Virginia. They found that the defendant did transport him from the town of Alexandria, in the sloop Hope, whereof the

defendant was master and owner, into the city of Philadelphia, in the State of Pennsylvania, where the slave made his escape before the expiration of the term for which he was hired. That the defendant used due diligence in endeavoring to recover the slave; but he was never recovered, and is lost to the plaintiff. That the defendant had, previous to the hiring of said slave, been in the habit of trading to Philadelphia, in the sloop Polly; but having sold his interest in that vessel, he purchased the said sloop Hope, took the command of her, and established her as a packet between Alexandria and Norfolk; and afterwards made two voyages in her to Philadelphia, in the last of which the said slave made his escape. That the defendant did not produce the said negro slave before a magistrate, nor lodge a description, &c., nor produce a written direction from the owner, &c., as required by the Act of the 25th of January, 1798. And if the law be for the plaintiff, they assessed his damages at \$453; but if for the defendant, &c.

Upon this special verdict, after it had been amended by consent, the COURT (THRUSTON, J., absent,) was of opinion that the law was for the plaintiff, and rendered judgment accordingly.

There had been several previous attempts to obtain a verdict in the cause, but the jurors could not agree.

On Saturday, the 2d of December, 1809, the jury having been out all night, came into Court, and requested the instruction of the Court, whether, under the Act of 1798, § 6, (pp. 374,) the defendant was not liable if he took the slave out of Virginia without a written authority, or a compliance with the other requisites of that act; and whether the written agreement for the hire of the negro was such a written authority as the 6th section of that act requires. Whereupon

The COURT instructed the jury that the defendant was liable in the case stated by them, and that the written agreement was not such a written permission as the act requires. That jury could not agree, and were discharged by consent. The cause came on again before another jury, at July term, 1811, when

The COURT (THRUSTON, J., absent,) refused to instruct the jury that a general hiring by the defendant authorized him to carry the slave to Philadelphia, and refused to instruct them that if the course of the defendant's business was known to the plaintiff's agent at the time of the hiring, it authorized the defendant to take the slave out of the State of Virginia. And also refused to instruct them that the defendant, by the hiring, became the owner of the slave for the term for which he was hired.

The same opinions and instructions were given upon the last

Hepburn & Dundas v. Auld; Dunlop & Co. v. Hepburn & Dundas.

trial, and bills of exceptions were taken; but no writ of error was prosecuted.

Mr. Jones and *Mr. E. J. Lee*, for the plaintiff.

Mr. C. Lee and *Mr. Taylor*, for the defendant.

JOHN A. BURFORD v. CRANDELL *et al.*

The Bank of Potomac has a lien upon its stock in the hands of a stockholder whose notes are lying over, unpaid.

THE bill was brought by John A. Burford, who, in right of his wife, was administrator of the estate of Joseph Dyson, her first husband, against Crandell's administratrix, and the Bank of Potomac, to compel the defendant Crandell to transfer ten shares of the stock of the Bank of Potomac to the plaintiff, as administrator of Dyson's estate, and in the mean time to prevent a transfer to others.

The facts appear to be, that Joseph Dyson died in September, 1803. His widow, Hannah Dyson, administered, and Crandell was her surety. She afterwards married the plaintiff Burford. By her marriage settlement, she was to manage her own property as a *feme sole*. After her marriage with Burford, she subscribed for ten shares of the Bank of Potomac, in her own name, and paid up the instalments. This stock she loaned and transferred to Crandell to give him a credit with the bank, and he obtained a discount upon his own note, indorsed by Mr. Powell. By one of the articles of association of that bank, no stockholder can transfer his stock while his notes are lying over unpaid. Crandell died, and his note was lying over.

All proper parties being made,

The COURT decided that the Bank had a lien on the stock; and upon final hearing, dismissed the bill.

HEPBURN & DUNDAS v. AULD, Agent of Dunlop & Co.

AND

DUNLOP & CO. v. HEPBURN & DUNDAS.

If the vendee of land bring a bill to vacate the contract because the title has been adjudged defective, the defendant may resist a decree by showing himself to be now ready to make a good title, if time be not of the essence of the contract, although a former bill by the vendor for a specific performance had been dismissed on account of the defect of title.

DUNLOP & Co. brought their bill in equity against Hepburn &

Hepburn & Dundas v. Auld; Dunlop & Co. v. Hepburn & Dundas.

Dundas, to annul the agreement of the 27th September, 1799, and to compel an account, and to pay the balance.

Hepburn & Dundas brought their bill against Colin Auld, agent of Dunlop & Co., for a specific performance of that agreement.

A former bill in equity, brought by Hepburn & Dundas against Auld, to compel a specific performance of the same agreement, had been dismissed by the Supreme Court of the United States, for want of a good title in Hepburn & Dundas, to the land mentioned in Graham's contract. 5 Cranch, 262.

After the dismissal of that bill at February term, 1809, Auld, in the name of his constituents, Dunlop & Co., brought the present bill in equity to vacate the agreement of the 27th September, 1799.

On the same day on which the subpoena issued in this case, H. & D. informed Auld that they had perfected their title, and were ready to execute a deed to him for the Ohio lands, upon his paying the balance; that is, the difference between the award and the stipulated value of Graham's contract. To which offer Auld replied that Dunlop & Co. had issued process against them to compel them to pay their debt and interest, in money; and that he did not believe that a Court of Equity would, under all the circumstances, compel them to take the land in satisfaction of the debt. After this, Hepburn & Dundas brought their second bill in equity against Auld for a specific execution of the agreement, and to compel him to take the land, and pay the difference between the award and the stipulated value of Graham's contract.

In answer to the bill of Dunlop & Co., which seeks to vacate the contract, and to open the account, and to compel payment of the whole debt in money, H. & D. say,

1. That the accounts are all closed by the award, and cannot now be opened.

2. That it was decided by the Supreme Court of the United States, in the suit at law brought by Auld for the penalty of the articles of agreement, that the tender of the assignment of Graham's contract, as pleaded, was a good tender; and that Auld ought to have accepted it; and that if he had accepted it, it would have discharged the debt due upon the award. And although this did not relieve them from the duty of executing a proper deed, when required, yet they are in no default, inasmuch as no conveyance has been required; and they are now able, and have offered, to make a good conveyance of the land to him, upon his paying the difference.

In answer to the bill of H. & D. against Mr. Auld, he resists a specific performance, at this late period, on various grounds: and among others,

Hepburn & Dundas v. Auld; Dunlop & Co. v. Hepburn & Dundas.

Because the tender of the assignment of Graham's contract was upon condition that he should first execute and deliver to them a release of all demands, &c.; and

Because their title was defective until March, 1809, after their bill for a specific execution had been finally dismissed by the Supreme Court; and

Because the object of Auld was to receive payment of a debt, and not to purchase land; and therefore time was very material; especially as it was well known to both parties that the rents and profits were by no means equal to the interest of the debt, and that the land has depreciated very much during this delay of the title.

CRANCH, C. J., delivered the opinion of the Court.

These causes are set for hearing on the bills, answers, exhibits, and sundry depositions respecting the value of the land and its depreciation.

There seems to be a considerable difference of opinion as to the value of the land, but the balance of evidence inclines to the fact that the land never was worth more than \$18,000 in cash, and that it has greatly depreciated.

This is not a common case of vendor and vendee, where the object is the purchase of an estate, the rents and profits of which may be an equivalent for the interest of the purchase-money, whereby delay is rendered immaterial. But it is the case of a creditor seeking payment of his debt, and of a debtor seeking to pay off his debt in lands. It is well known that in this country, the price of lands, especially of new lands, fluctuates very much; and therefore where the object is to raise money by the sale of lands, to pay off a debt, time is very material. I should therefore doubt of the propriety, in this country, of applying to such cases the rule of equity which has prevailed in England, between vendor and vendee, that if the vendor's title is perfected before a decree upon his bill for a specific performance is rendered against him, a specific performance shall be decreed. But if it be proper to apply that rule to such a case as this, yet the inference from the same rule is, that if the vendor's title be not perfected before decree on his bill, the decree shall be against him; and I do not remember a case in which a vendor has obtained a decree for a specific performance upon a second bill, brought after a dismissal of the first for want of title. If his right to a specific performance be not barred by the dismissal of his first bill on the merits of his case, will it be barred by the dismissal of his second, or third bill? If not, where shall he be stopped — or what end can there be to the controversy?

This view of the subject would be conclusive in my mind, if

Hepburn & Dundas v. Auld ; Dunlop & Company v. Hepburn & Dundas.

Mr. Auld had not brought a bill to vacate the contract, thereby impliedly admitting it to be in force until declared void by a decree of this Court. When a court is called upon to vacate a contract by reason of the non-execution thereof by the other party, the defendant has a right in equity to offer himself able, ready, and willing to perform it; and if he do so offer, the Court ought to suffer him to perform, if time be not of the essence of the contract. In this case, the Supreme Court has declared, in effect, that time is not material, if the party can make a good title before the decree. Mr. Auld having instituted a suit, praying for a decree to vacate the contract, it would seem, by analogy to cases of foreclosure, that H. & D. would have a right to perform before the passing of that decree, if they can.

The judgment of the Supreme Court in the suit at law, brought by Auld against H. & D. was in their favor only upon the tender of the assignment as pleaded in one of the pleas, in which the title was not brought in question. On the other two demurrers, if they gave judgment at all, it must have been in favor of Auld, because those demurrers brought into view the same defects of title which the Supreme Court decided to be sufficient to dismiss the bill for a specific execution of the contract. The effect, therefore, of the opinion of that court upon the two cases, was, that although the tender, as pleaded, was good, yet upon all the facts of the case it was not such a tender as Auld was obliged to accept.

The tender of the assignment has been considered by the counsel of H. & D. like a tender of so much money, which stops interest from the time of tender until a new demand be made. But the tender which will stop interest, must be a tender of that which the creditor is bound to accept. Here the Supreme Court has decided that Mr. Auld was not bound to accept the assignment tendered, and therefore such a tender does not stop interest. Mr. Auld was bound to receive only such an assignment, of such a contract, with such powers as would enable him to maintain an ejectment against Graham's heirs, or would enable him to compel a specific performance by payment of the purchase-money. It is immaterial what were Mr. Auld's motives at the time, for refusing to accept the assignment. H. & D. must show that he was bound to accept what they tendered; and as they could not tender what he was bound to accept until the 20th of March, 1809, and did not give him notice of their ability to perform until the 27th of March, 1809, they ought to make compensation for the delay by payment of interest upon the amount of the awards from its date to the 27th of March, 1809.

Such a decree is conformable to the precedent in the case of

Hepburn & Dundas v. Auld; Dunlop & Company v. Hepburn & Dundas.

Clute v. Robinson, 2 Johns. 595, in the Court of Errors at New York, a precedent entitled to much respect, not only for its equity, but on account of its being the unanimous decision of a most respectable court. That case, indeed, seems to justify the calculation of interest to the time of this decree; and we have considerable doubt whether it ought not to be so calculated, because H. & D. did not make a regular tender of a conveyance, and have been in the receipt of the rents and profits ever since that time; but as they declared their readiness to convey a good title on the 27th of March, 1809, and as Mr. Auld in his answer intimated that he was not then bound to accept such a conveyance, we think he waived the necessity of a tender, and therefore the interest ought to stop at that time. As the interest on the debt is to stop on the 27th of March, 1809, and as Dunlop & Co. were bound on that day to receive the title offered, they are entitled to the rents and profits which may have accrued since that date, and an account of them ought to be taken, if required.

(To avoid an account, however, the Court gave interest to the present time, December 23d, 1813.)

These suits having been heard at the same time,

The Court, in the suit of *Dunlop & Company v. Hepburn & Dundas*, decreed that H. & D. should pay to Dunlop & Co. or their agent, Colin Auld, the sum of \$33,060 37, being the sum awarded, at the par of exchange, with interest thereon, at 5 per cent. from the 1st of January, 1800, till the time of rendering the decree; but that the sum of \$21,112, part thereof might be discharged by a conveyance, within a certain time of the land mentioned in Graham's contract to Colin Auld in trust for Dunlop & Co.

And in the suit of *Hepburn & Dundas v. Auld*, that upon H. & D.'s making the payment in that manner, Auld, as agent of Dunlop & Co. should execute and deliver to H. & D. such a receipt and discharge of all the claims of Dunlop & Co. against them, as the Court might approve.

Reversed by the Supreme Court, (1 Wheat. 179,) who ordered the bill of *Dunlop & Company v. Hepburn & Dundas* to be dismissed; and in the case of *Hepburn & Dundas v. Auld*, decreed a sale of the land mentioned in Graham's contract, and the proceeds to be paid to Dunlop & Co. or their agent, and that H. & D. should convey the lands to the purchasers; and that H. & D. should pay to Dunlop & Co. or their agent, on or before the 1st day of April then next, \$9,143 72, being the difference between the sum awarded with interest thereon at 6 per cent. per annum from the 1st of January, 1800, to the 27th of March, 1809, and the sum due upon Graham's contract on the

Hepburn & Dundas v. Auld; Dunlop & Company v. Hepburn & Dundas.

1st of January, 1800, and that an account should be taken of the rents and profits since the 27th of March, 1809, and that H. & D. pay over the same to Dunlop & Co. or their agent.

The only substantial difference between this decree and that of the Circuit Court, is, that it gives interest upon the award at 6 per cent. from 1st January, 1800, to 27th March, 1809, and the rents and profits afterwards; whereas the decree of the Circuit Court gave interest upon the award at 5 per cent. from the 1st of January, 1800, to the time of the decree, in lieu of the rents and profits.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1813, AT WASHINGTON.

WAGER'S ADMINISTRATRIX v. LEAR.

Special bail will be required in an action of covenant for rent, upon a proper affidavit.

COVENANT for rent arrear. The plaintiff had not filed his declaration, but had filed the lease, and an account, with the plaintiff's affidavit that it was just and true.

Mr. Jones, for the defendant, offered an appearance without bail. The paper filed is not a lease, but an agreement for a lease. No action of covenant for the non-payment of rent will lie upon it. No lease in Virginia for more than five years is good, unless acknowledged or proved by three witnesses and recorded. There are only two witnesses to this deed. The only action which can be supported in this case, is for actual use and occupation from year to year.

Mr. F. S. Key, contrà. The account and affidavit are sufficient to hold the defendant to bail, without the lease.

The COURT ruled the defendant to give special bail.

UNITED STATES v. JACOB DIXON.

An indictment will not lie against an inhabitant of the city of Washington for retailing spirituous liquors within the city.

INDICTMENT for retailing spirituous liquors within the city of Washington, without license under the Act of Maryland, 1784, c. 37, § 24.

The case having been submitted without argument,

The COURT decided that the exclusive power of granting licenses for retailing, and the exclusive power of regulating the same, was, by the charter of Washington, vested in the corporation, and that the indictment would not lie.

UNDERWOOD'S ADMINISTRATOR v. HUDDLESTONE.

Notice of the non-payment of a note signed by *John*, is not notice of the non-payment of a note signed by *James*, unless the party had good reason to believe that the note of James was intended.

ASSUMPSIT, against the indorser of James B. Roddy's note. The notice given to the defendant was of the non-payment of a note signed John B. Roddy, &c., describing the note correctly as to every circumstance, except the signature John, instead of James.

The COURT (THRUSTON, J., doubting,) said that if the jury should be of opinion, from the evidence, that the defendant had good reason to believe it to be the note in the declaration mentioned, the jury ought to presume that the defendant had reasonable notice, &c.

Mr. Jones, for the plaintiff. *Mr. Law*, for the defendant.

The COURT had before instructed the jury, that notice of the non-payment of a note signed by John B. Roddy, was not notice of the non-payment of a note signed by James B. Roddy; but that opinion was founded upon the naked statement of the fact that the notice was of a note signed John B. Roddy.

KNOWLES v. PARROTT.

In an action by the indorsee against the indorser of a promissory note, the maker is a competent witness to prove the contract to be usurious, unless he is interested.

ASSUMPSIT, against the indorser of Vincent King's note.

The defendant pleaded usury between the maker and the payee; and offered the maker of the note as a witness to prove the usury.

Mr. P. S. Key, for the plaintiff, objected. Although the books differ upon the question of competency, yet the case of *Walton v. Shelley*, 1 T. R. 296, is supported by the best authorities, although it was overruled by the case of *Jordaine v. Lashbrook*, 7 T. R. 601. See *Hart v. McIntosh*, 1 Esp. Cases, 298, and *Rich v. Topping*, *Ib.* 176. All the American cases coincide with *Walton v. Shelley*, except one case in the Court of Appeals in Maryland. *Stille v. Lynch*, 2 Dallas, 194; *Allen v. Holkins*, 1 Day's Rep. 17; *Baker v. Arnold*, 1 Caines's Rep. 258, 267; *Baring v. Reeder*, 1 Hen. & Mun. 175; *Coleman v. Wise*, 2 Johns. 165;

Warren v. Merry, 3 Mass. 27; *Webb v. Danforth*, 1 Day, 301. Upon principle, *Walton v. Shelly* is right. It would destroy the negotiability of paper, if parties were permitted to invalidate their own notes.

Mr. Jones, contrà. The general rule of evidence is, that every person is a good witness, who is not disqualified by infancy, defect of understanding, or interest. The only exception in the old cases, is upon the principle of estoppel by the signature of a deed, either as principal or witness. But the doctrine, so far as it respects witnesses to a deed, has been long exploded. The maxim, *nemo, turpitudinem suam allegans, audiendus est*, applies only to parties, not to witnesses. The case of *Walton v. Shelly*, is *sui generis*, an exception to the general rule. It is a new principle set up to support negotiable paper; but that the paper is void by usury, in the hands of an innocent holder, is settled law. The only question is, how shall the fact be ascertained? The policy of the law is to detect usury, which the law considers more important than the negotiability of paper. Public policy, is therefore in favor of admitting the witness. In the present case, the plaintiff is a party to the usury, and therefore no principle of policy can operate in his favor.

The COURT (THRUSTON, J., *contrà*.) was of opinion that the maker of the note was a competent witness, unless interested.

Mr. Key, for the plaintiff, then contended that Mr. King was interested; for, if the plaintiff should recover against Parrott, and he pays the money to the plaintiff, Parrott will have a right of action against King, notwithstanding his discharge under the insolvent law, because it will be a new debt arising since his discharge; whereas if the plaintiff is defeated in the present action, Mr. King will be entirely exonerated.

The COURT, upon that ground, (*nem. con.*) rejected the witness.

UNITED STATES v. RUTH DOUGLASS.

A free born mulatto is a competent witness against a white person.

INDICTMENT for larceny. The defendant was a white woman. Nancy Butler, a free born mulatto, was permitted to testify for the United States, upon the authority of the *United States v. Mul-lany*, at December term, 1808. 1 Cranch, C. C. 517. (THRUSTON, J., absent.)

NICHOLLŌ v. HAZEL.

The Court will not reinstate a replevin which has been discontinued at a previous term.

Mr Blake, for the defendant, moved the Court to reinstate an action of replevin, which had been discontinued at December term, 1812, by reason of the non-appearance of the plaintiff.

But the Court refused.

UNITED STATES v. NEGRO JACOB BRUCE.

An informal instrument of manumission, accompanied by an actual manumission of the defendant before the commission of the offence charged, followed by a formal deed of manumission after the commission of the offence, is sufficient evidence that the defendant was not a slave at the time of committing the offence.

INDICTMENT under the statute of Maryland, 1751, c. 14, for conspiring with Negro Charles to burn Mrs. Love's house, Charles having been convicted and pardoned. (*Ante*, p. 76.) The indictment charged the defendant as a slave. The statute makes it a capital offence.

Mr. Jones, for the United States, offered Charles, a slave, as a witness.

Mr. John Lee, *Mr. D. Forest*, and *Mr. Law*, for the defendant, objected that by the Maryland law, 1717, c. 13, § 3, no slave can be a witness even against a slave, in a capital case.

Mr. Jones. The statute of 1751, c. 14, upon which this prosecution is founded, admits slaves to be witnesses.

The counsel for the defendant, contended that he was not a slave at the time of committing the offence; and as evidence of his freedom, offered an informal paper, purporting to be an instrument of manumission, and evidence that he was actually set free before the commission of the offence by Mr. John M. Goldsborough, his master, for his faithful services; and a formal deed of manumission, executed after the commission of the offence, agreeably to the provisions of the Maryland law, 1796, c. 67.

The COURT (THURSTON, J., absent,) was of opinion, that as between the master and slave, the informal paper, with actual manumission, was valid, and that the defendant could not be convicted as a slave under the Act of Assembly.

WHETCROFT, for the use of Vickers *et al.* v. WHITE.

If the indorser of a promissory note accept an order from the indorsee, for the amount of the note, in favor of a third person, a subsequent attachment of the money in the hands of the indorser, by a creditor of the indorsee, will not avail him.

ASSUMPSIT, against the maker of a promissory note indorsed by Burford to Minifie, who indorsed it to Whetcroft in trust for the benefit of Minifie. Minifie, being indebted to Long, gave him an order on Burford to let Long have such goods as he should want. Burford accepted the order. Vickers and others, creditors of Minifie, served an attachment on Burford, and on White, and on Whetcroft. Burford afterwards let Long have goods on account of the order.

Mr. Key, for the plaintiff, contended that the attachment having been served on Burford before he delivered the goods to Long, (although after his acceptance of the order,) bound Burford, and that his delivery of them afterwards was in his own wrong.

Mr. Law, *contrà*.

The COURT (FIRZHUGH, J., absent,) said the order and acceptance were to be presumed to be equal to the amount of the debt due from Burford to Minifie, and were an assignment thereof to Long; and that the assignment of the note to Whetcroft, being for the benefit of Minifie, the payment by Burford to Long was a good set-off.

WHETCROFT v. BURFORD.

An account for work and labor cannot, at the trial, be given in evidence upon *non assumpsit*, as a set-off, unless the account has been filed and notice given.

ASSUMPSIT, against the defendant, as indorser of the note of Ambrose White, indorsed by Burford to Minifie, and by Minifie to Whetcroft as his agent and trustee.

Mr. Law, for the defendant, offered to prove work and labor done by White for Minifie on account of this note.

Mr. Key, for the plaintiff, objected, because notice of such set-off had not been given before the jury was sworn.

The COURT, (*nem. con.*) upon consideration of the Maryland Act of 1785, c. 46, § 7, which requires the account to be filed, or pleaded, refused to receive the evidence.

Gittings v. Burch.

GITTINGS v. BURCH.

New evidence cannot be heard upon an appeal from the Orphans' Court.

THE COURT (*nem. con.*) was of opinion that upon an appeal from the Orphans' Court, new evidence could not be heard.

CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1814, AT ALEXANDRIA.

UNITED STATES *v.* NEGRO PETER.

In Alexandria, a prisoner indicted under the Act of Congress, for larceny, has the right of peremptory challenge.

Mr. Jones, Attorney for the United States, admitted that under the Virginia law, of November 13th, 1792, § 8, p. 103, the prisoner, who was indicted for larceny under the Act of Congress of April 30, 1790, § 16, [1 Stat. at Large, 116,] was entitled to a peremptory challenge of twenty jurors.

WILLIAMS *v.* HOPKINS.

Assumpsit will not lie for the costs of appeal, against the person for whose use the appeal was prosecuted, and for whose use it was entered upon the record of the Court of Appeals; and a transcript of the record is not admissible evidence to support the action.

THE suit in equity of *Hodgson*, for the use of *Hopkins*, *v.* *Williams and Clark*, was carried up by the plaintiff to the Court of Appeals of Maryland, where the plaintiff failed to prosecute his appeal with effect. *Williams and Clark* brought the present action of assumpsit against *Hopkins*, for whose use the appeal was prosecuted, to recover 94 dollars and 11-3 cent costs on the appeal.

Mr. E. J. Lee, for the plaintiff, offered in evidence a transcript of the record of the Court of Appeals in the suit of *Hodgson*, for the use of *Hopkins*, *v.* *Williams and Clark*.

Mr. C. Lee, for the defendant, objected, that the record contained no evidence of any obligation or promise of the defendant

to pay. There must be a promise in writing, for it is the debt of another. The Act of Maryland, 1796, c. 43, § 13, applies only to actions at law, not to suits in equity; and if it did, the remedy must be by attachment, as provided by the statute; or, if it has become a debt of record, the remedy is by an action of debt. The assumpsit is merged in the higher remedy.

Mr. E. J. Lee, in reply. The record is admissible to prove that the suit was prosecuted for the benefit of Hopkins. The remedy by attachment prescribed by the Maryland statute, is only cumulative. That statute did not create a new obligation, and if it did, it is applicable only to actions at common-law, originally "instituted" for the use of a third person.

The COURT (THRUSTON, J., absent,) rejected the transcript of the record as evidence.

CATLETT AND WIFE v. FAIRFAX.

In Alexandria, an execution *de bonis propriis*, is the proper process against an executor, upon a decree in equity for the balance of his administration account.

THIS was a motion to quash an execution against the defendant, *de bonis propriis*, on a decree in equity against him as executor of the will of Lord Fairfax, for the balance due upon the settlement of his administration account, to the plaintiff's wife, daughter of the testator.

Mr. E. J. Lee, for the plaintiff, stated that the execution in this form was according to the practice in the Court of Chancery in Virginia, and produced a certificate, to that effect, from Mr. Henning, the Register of that Court.

Motion overruled. (THRUSTON, J., absent.)

COOK v. CONWAY'S EXECUTORS.

An assignment of "all the assignor's estate and effects in possession, or which may accrue or become due and owing to him," will not transfer a mere possibility of a legacy.

DANIEL MUSE assigned his wife's legacy, after the death of R. Conway, the testator, to Cook; but before the testator's death he had assigned to R. Edwards and S. Downing, "all his estate and effects in possession, or which may accrue or become due and owing to him."

The COURT (FITZHUGH, J., absent,) was of opinion that Cook was entitled to the legacy.

NEGRO ROBERT SIMMONS v. JOHN GIRD.

The time of a slave's sailing on a voyage from Alexandria, is not to be considered as a part of his year's residence so as to entitle him to freedom, under the Virginia law of 17th December, 1792, § 2.

THE plaintiff was a slave, brought into Alexandria, whence he sailed on a voyage, and returned to Alexandria, but was not "kept therein one whole year together, or so long, at different times, as amounted to one year," unless the time of his sailing on the voyage should be included.

This being stated in a special verdict, the Court rendered judgment for the defendant.

CIRCUIT COURT OF THE UNITED STATES.

JUNE TERM, 1814, AT WASHINGTON.

PEIRCE v. REINTZEL'S ADMINISTRATOR.

The principal obligor, having confessed judgment, and having been released by the defendant from the costs of this suit, is a competent witness for the defendant, to prove the bond usurious.

DEBT on the joint and several bond of Daniel and John Reintzel. Daniel, the principal obligor, having confessed judgment, was offered as a witness for the defendant, to prove usury. The plaintiff objected, and cited the case of *The Governor of Virginia v. Evans*, in this Court at November term, 1809, 1 Cranch, C. C. 581; and *Riddle v. Moss*, 7 Cranch, 206. The defendant released to Daniel Reintzel all costs of the present action in case judgment should go against him.

The COURT (THRUSTON, J., doubting,) permitted the principal obligor to testify for the defendant.

NEGRO EMANUEL v. HENRY W. BALL.

If a slave escape from his master in Virginia, and be found in Washington, and there sold by his master, the slave does not thereby acquire a right to freedom.

THIS was a petition for freedom.

The petitioner was permitted to come from Virginia, to the city of Washington to see his wife, and to return by a certain day; but he stayed some months longer, and was taken up in Washington, by an agent of his owner, but escaped and eloped, and the agent sold him to the defendant, while he was so eloped and while he was in the city of Washington.

The petitioner's counsel prayed the Court to instruct the jury that upon that state of facts the petitioner was entitled to his freedom.

But the Court refused, and instructed the jury that he was not entitled to his freedom under the Maryland law of 1796, c. 67.

NEGRO VIOLETTE v. HENRY W. BALL.

A slave does not acquire a right to freedom by being sent from Washington to Virginia for sale, and, not being sold, brought back after eight or nine months' absence.

PETITION for freedom.

The COURT (THRUSTON, J., absent,) refused to instruct the jury that the petitioner was entitled to freedom by being sent from the city of Washington to Virginia for sale, and not being sold, brought back to the city, after an absence of eight or nine months.

UNITED STATES v. JOHN A. BURFORD.

A defendant in equity is a competent witness upon an indictment against the plaintiff in equity, for perjury in his affidavit made to procure an injunction.

INDICTMENT for perjury, in the defendant's affidavit to a bill in equity for an injunction against Peter Miller.

The Attorney for the United States, offered to examine the defendant in equity, Peter Miller, as a witness, to prove the perjury.

Mr. Law and *Mr. F. S. Key*, for the defendant, objected, that the question of injunction being still pending, the defendant in equity was not a competent witness to prove the perjury, and cited *Rex v. Dalby*, Peake, N. P. 12; and *Rex v. Menetone*, 4 East, 576.

But the COURT (*nem. con.*) overruled the objection; because the conviction of Burford could not affect the cause in chancery; the oath of the complainant not being evidence either on a motion to dissolve the injunction after answer, or on the final hearing; but is only required to satisfy the chancellor that there is *prima facie* ground to order the injunction.

WARFIELD v. WIRT.

The Court will not, upon motion, quash the return of a *fi. fa.* levied upon an equity of redemption.

Mr. Wallach, in support of the motion, cited the following authorities: — Statute De Mercatoribus, 13 Eliz. 1, statute 3; The statute staple, 27 Eliz. 3; 23 H. 8, c. 6; 5 Geo. 2, c. 7; 2 Cruise, 106;

Keech v. Hall, Doug. 21; *Powell on Mort.* 227, 232; *Birch v. Wright*, 1 T. R. 378; *Moss v. Gallamore*, Doug. 279; Bac. Ab. tit. Execution; Com. Dig., tit. Execution; *Scott v. Scholey*, 8 East, 467; *Cadogan v. Kennett*, Cowp. 432; *Hartwell v. Chitlers*, Amb. 308; *Lyster v. Dolland*, 1 Ves. 431; *Burdon v. Kennedy*, 3 Atk. 739; *Burgess v. Wheate*, 1 W. Bl. 135; *Turner v. Fendall*, 1 Cranch, 115; *Plunket v. Penson*, 2 Atk. 294; Esp. N. P. 447; Maryland law, 1794, c. 60, § 10, which provides the mode of getting at equitable interests, by application to the Chancellor, and the recent Act of Maryland to subject equitable interests to execution.

Mr. F. S. Key, *contrà*, admitted the old doctrine in England to be as contended for by the defendant. But it has been decided in Maryland that no release is necessary by a mortgagee to a mortgagor to enable the latter to maintain ejectment. The statute 5 Geo. 2, c. 7, ought to be construed to make equitable interests liable upon *feri facias*. An equitable title to land is a real estate. Estate means right to land, whether legal or equitable.

The act of 1794, c. 60, § 10, applies only to cases of equitable title by contract, &c., where the creditors are without remedy either at law or in equity; where the vendee has not paid the money, and the creditor has no right to step in and pay it for him and avail himself of the benefit of the contract.

Mr. Key also mentioned the case of *Campbell v. Morris & Nicholson*, in the Court of Appeals in Maryland, in which an attachment of an equity of redemption was supported by that court, against the opinion of the general court; but he admitted that some of the judges of the court who decided that case had certified that although that point seems to be decided in that case, yet they did not mean to decide it.

Mr. Law, in reply, cited Tid. Pr. 919.

The COURT (*nem. con.*) refused to quash the return, because the point did not appear upon the return; and they also doubted their jurisdiction to decide the question upon such a motion; or to quash a return upon any such ground.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1814, AT ALEXANDRIA.

UNITED STATES *v.* RICHARD H. LEE.

The declaration of the prisoner of his intention as to any of the overt acts of treason charged in the indictment, may be given in evidence before evidence is offered of such overt acts.

The declaration of the prisoner, accompanying the overt act laid in the indictment, may be given in evidence to show his intention in doing the act; but his confession of having committed the overt act charged cannot be given in evidence.

THE defendant was indicted for treason against the United States, by adhering to their enemies, giving them aid and comfort, by supplying them with fruit and melons, showing them the channel of the River Potomac, and informing them of the situation of the troops of the United States.

E. J. Lee, on the trial, objected to evidence of conversations held by the prisoner with the witness, before proof of some overt act. Such conversations cannot be given in evidence as confessions; for by the Constitution, Art. 3, § 3, no confession can be admitted but a confession in open court. *Francis Willis's case*, Foster, 241, 244; *Respublica v. John Roberts*, 1 Dallas, 39; 4 Tucker's Bl. 357, note. Corroborative evidence cannot precede the principal evidence. 4 Tucker's Bl., Appendix, 11, 12.

Mr. Jones, Attorney for the United States, *contra*. In *Burr's case*, the Court said that the order of evidence is a matter of discretion with the Attorney of the United States. And the chief justice, in what he said respecting corroborative testimony, alluded to evidence of general evil intent; not of his intent in relation to the act charged.

The COURT, (THRUSTON, J., absent,) said that the witness (Mrs. Alexander,) might be examined as to the prisoner's declarations of his intention as to any of the overt acts charged in the indictment, although no evidence was yet offered of such overt acts.

Mrs. Alexander and other witnesses then proved, that the prisoner

wanted to buy water-melons ; and said that the British commodore had suffered him to pass upon condition that he would bring them water-melons, which he promised to do ; that he had shown a British vessel how to get off the flats ; and that he wanted to get information respecting the militia, to communicate it to the British. The witnesses also proved that he bought water-melons and apples of Mrs. Marshall ; that he had a schooner in the channel, and that he said he preferred the English government to ours.

Mr. E. J. Lee, for the defendant, moved the Court to instruct the jury that this evidence was not to be regarded ; as no overt act of adherence to the enemy had been proved.

Mr. Jones, contra, contended, that there is sufficient evidence of an open act. That the purchase of melons, and collecting information to be sent to the enemy, and his actually setting off to carry it, is a sufficient overt act, although he was intercepted and prevented from carrying it to the British. *Foster*, 217 ; *Id. c. 3*, § 8.

Mr. E. J. Lee, in reply. The only facts proved are that he purchased melons, and inquired about the militia. There is no evidence of his intent. His confession upon that subject cannot be given in evidence.

The COURT (*THRUSTON, J.*, absent,) were of opinion that the declaration of the prisoner accompanying the overt act laid in the indictment may be given in evidence to show the intent with which the act was done ; but that his confession of having given information of the channel, and of his having been on board the fleet, was not evidence.

The jury, after retiring a few minutes, found the prisoner not guilty.

JOHN DAVIES v. BENJAMIN DAVIES'S EXECUTRIX.

When the subscribing witnesses to a bond reside in a foreign country, evidence of the handwriting of the obligor and subscribing witnesses, will be left to the jury as *prima facie*, but not conclusive proof, upon the issue of *non est factum*.

A surety in the defendant's administration bond, is a competent witness for the defendant.

DEBT on bond. Plea *non est factum*, and issue.

Mr. Taylor, for the plaintiff, offered a deposition of the plaintiff's son, to prove the handwriting of the obligor and subscribing witnesses, who resided in London, and were not proved to be dead.

Mr. C. Lee, for the defendant, contended that this was not sufficient evidence of the execution of a bond. That it is only in

commercial causes that the rule has been relaxed. The subscribing witnesses are supposed to be living, and a commission might issue to take their depositions. There ought at least to be some evidence that the obligor acknowledged the debt. It is certainly not conclusive evidence of the execution of the bond. The delivery is not proved. It is only the opinion of the witness that the signatures of the obligor and subscribing witnesses are genuine.

Mr. Taylor, contra, cited *Adam v. Kers*, 1 Bos. & Pul. 360, and *Barnes v. Trompowsky*, 7 T. R. 265.

The COURT (THRUSTON, J., absent,) permitted the evidence to go to the jury, not as conclusive, but *primâ facie* evidence of the execution of the bond.

The Court also permitted Isaac Entwistle to be examined as a witness for the defendant, although he was her surety in her administration bond; on the authority of the case in Esp. N. P. 163, and the case of *Carter v. Pearce*, 1 T. R. 163. See also *Craig v. Reintzel*, *post*.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1814, AT WASHINGTON.

GAREY *v.* JOHNSON.

Trespass *vi et armis*, will lie for the master against one who beats his slave, although there should be no loss of service.

TRESPASS *vi et armis* for beating the plaintiff's slave.

The COURT instructed the jury that the plaintiff might recover if the defendant unnecessarily, and without sufficient provocation, beat the plaintiff's slave, although the plaintiff did not prove any damage by loss of service.

SAMPSON *v.* GEORGE JOHNSON.

The Court will not, at the trial, compel the plaintiff to produce a charter-party, without previous notice, of which charter-party the defendant has a counterpart; nor permit the defendant to give it in evidence without proof by the subscribing witness. The captain's protest may be given in evidence to corroborate his testimony.

ASSUMPSIT, for freight. The defendant proved that there was a written charter-party signed by Carnes and Johnson, and that the defendant had one part, and the plaintiff the other. The defendant required the plaintiff to produce his part.

But the COURT refused to compel him.

The defendant then produced his part, which had a subscribing witness (Thomas L. Griffin,) and offered to prove by another witness, (not a subscribing witness,) the handwriting of the parties. That the subscribing witness lives in Richmond, Virginia, one hundred and twenty miles from Washington. No measures having been taken to obtain his testimony, the COURT refused to suffer the charter-party to be given in evidence.

The COURT permitted the captain's protest to be given in evidence, to corroborate his testimony.

 Otteridge v. Thompson.

O'NEALE v. WILLIS.

Quære—whether a free colored man is a competent witness in a cause between white persons?

ASSAULT AND BATTERY, by beating the plaintiff's slave.

A free colored man was offered by the plaintiff as a witness.

The COURT was divided as to his admission. CRANCH, C. J., was in favor of admitting him, upon the authority of *Mullany's case*, in this court, 1 Cranch, C. C. 517, at July term, 1809. THRUSTON, J., *contrà*. The witness was not sworn. A juror was withdrawn by consent.

 OTTERIDGE v. THOMPSON.

An alien enemy, resident here by license of the government of the United States, is competent to maintain a personal action; and if residing here before the war, as a mechanic, and continuing so to reside until the time of bringing suit, the jury may presume that he was remaining here under the permission and license of the government; although he had not reported himself according to the President's proclamation.

ASSUMPSIT. Plea, alien enemy. Replication that the plaintiff, at the time of the impetration of the writ, was resident in the United States, with the license of the government. General rejoinder, and issue.

Mr. Law, for the plaintiff, said that the replication was according to a form in Story's Pleadings, and cited *Wells v. Williams*, 1 Ld. Raym. 282; 1 Salk. 46, S. C.; *Sparenburg v. Bannatyne*, 1 Bos. & Pul. 163, 165, and *Clarke v. Johnson*, 10 Johns. 59.

It was proved that the plaintiff was a mechanic, and was here before the war, and continued to reside here until the action was brought.

Mr. Key, for the defendant, objected that the defendant ought to have reported himself, according to the President's proclamation, in order to entitle himself to protection.

The COURT, at the request of the plaintiff's counsel, instructed the jury that, from the circumstances above stated, they might presume that the plaintiff was residing here under the permission and license of the government, although he had not reported himself according to the proclamation.

UNITED STATES v. CHRISTOPHER MINIFIE.

A colored person who has been "made free in virtue of" the Act of Maryland, 1796, c. 67, is not a competent witness against a white person.

INDICTMENT, for larceny, against a white man.

Mr. Jones, for the United States, offered, as a witness, a black man who had obtained his freedom by being removed from Virginia to Maryland, contrary to the Maryland law of 1796, c. 67.

Mr. Key, for the defendant, objected; and relied upon the 5th section of that statute, which declares that no slave "who shall be manumitted or made free by virtue of that act," "shall be entitled" "to give evidence against any white person."

The COURT (CRANCH, C. J., *contrà*,¹) rejected the witness.

NOTE. The Honorable Nicholas Fitzhugh, one of the judges of this court, highly respected as a judge, and beloved as a man, died at his house in Alexandria, on Saturday, the 31st of December, 1814, of a typhus fever. He was succeeded by the Honorable James Sewall Morsell, whose commission is dated January 11th, 1815, and who took his seat on the bench, at Washington, on Monday, the 16th.

There were no cases at April term, 1815, worth reporting.

¹ CRANCH, C. J., not having the statute then before him, supposed it referred only to voluntary manumission.

CIRCUIT COURT OF THE UNITED STATES.

JUNE TERM, 1815, AT WASHINGTON.

UNITED STATES *v.* JAMES CARRICO.

Upon an indictment for selling a free person as a slave, under the Maryland law, 1796, c. 67, parol evidence may be given of the contents of papers delivered by the witness to the defendant, without a previous notice to produce them.

THE witness stated that he delivered to the defendant the papers which he had received with the woman who was sold, which papers showed that she was bound to serve only three years and nine months.

Mr. Key and *Mr. Van Horne*, for the defendant, objected to parol evidence of the contents of the papers without previous notice to the defendant to produce them; and cited *Peake, Ev.* 110, 111, *American note*, which refers to *Commonwealth v. Messenger*, 1 *Binney*, 273; *State v. Osborn*, 1 *Root*, 152, and *State v. Blodget*, *Id.* 534.

But the Court (*MORSELL, J.*, not sitting, having been of counsel for the defendant,) overruled the objection. *Quære?*

A special verdict was found, upon which judgment was arrested.

THE BANK OF WASHINGTON *v.* KURTZ.

Parol evidence cannot be given of the contents of a letter from the notary public to the defendant, put into the post-office, without previous notice to the defendant to produce it.

THE Court refused to permit the notary public to give parol evidence of the contents of his letter to the defendant, who was the indorser of *George Frank's* promissory note, without previous notice to the defendant to produce the original letter, on the authority of *Underwood v. Huddlestone*, [*ante*, 76,] June term, 1813. *Quære?*

BUSSARD v. WARNER'S BAIL.

If the principal be discharged under the Insolvent Act before the bail be fixed, and the bail, being taken in execution, give a note for the amount of the debt, the Court, upon the return of the execution, will, on motion, order the note to be given up to be cancelled.

Mr. Wallach, for the bail, obtained a rule to show cause why the note given by the bail, who was taken on the execution, should not be given up to be cancelled, on the ground that Warner was discharged under the Insolvent Act before the bail was fixed. *Manning v. Patridge*, 1 East, 593; *Donnelly v. Dunn*, 2 B. & P. 45. Warner was discharged before judgment on the *scire facias*, which was more than a year ago.

Mr. Wiley and *Mr. Key*, for the plaintiff, contended that it was too late. The execution against the bail was returned to this term satisfied; and the Court could not rescind its judgment upon the *scire facias* after the term at which it was rendered had expired.

The COURT (MORSELL, J., doubting,) ordered the note to be given up to be cancelled.

UNITED STATES v. BENNET SMITH.

A note of an unincorporated bank, "payable out of the joint funds thereof and no other," is a promissory note within the meaning of the Maryland statute, 1799. c. 75, § 1.

The note must be precisely and accurately set forth in the indictment.

If the defendant be acquitted upon a flaw in the indictment, he will be remanded for trial at the next term.

INDICTMENT for forging a promissory note of the Farmers' & Mechanics' Bank, (not incorporated.)

Mr. Lear and *Mr. Law*, for the prisoner, objected to the admission of the note in evidence, because it was "payable out of the joint funds thereof, and no other," and therefore not such a promissory note as was intended by the Act of Maryland, 1799, c. 75, § 1, upon which the indictment was founded; it not being, as they said, a negotiable promissory note; and they said it was not a bank-note within the meaning of the Maryland act of 1793, c. 35, § 2; and therefore could not be given in evidence to support the averment that it purported to be a promissory note of the Farmers' & Mechanics' Bank.

But the COURT (MORSELL, J., not sitting,) overruled the objection.

Lee v. Cassin.

The prisoner's counsel then objected that in setting forth the note in the indictment, the signature was written "W. Marbury," but the signature to the note was "Wm. Marbury," and for that variance the Court refused to suffer the note to be given in evidence.

Verdict, not guilty. Prisoner remanded to be tried at the next term on a new indictment.

LEE v. CASSIN.

Upon a note payable on demand, the cause of action does not accrue until demand made; and if the defendant remove before demand, the act of limitations is no bar. The act of Maryland is no bar, in the county of Washington, D. C., to an action upon a note made by the defendant in Massachusetts, if the plaintiff has always resided in that State; and to the plea of the statute he may reply that he was beyond seas, &c.

ASSUMPSIT upon the defendant's promissory note, made in Massachusetts, where all the parties resided.. There was a count also for money had and received.

The defendant pleaded, 1st. *Non assumpsit*. 2d and 3d. *Non assumpsit*, and *actio non accrevit infra tres annos*, under the Maryland act of limitations. 4th. *Non assumpsit infra sex annos*, under the act of limitations of Massachusetts.

The note was payable on demand, and to the 4th plea the plaintiff replied that the defendant removed from Massachusetts before demand, and consequently before the cause of action accrued; and that he left no property, &c.

To the 2d and 3d pleas the plaintiff replied that he was beyond seas, &c.

To these replications the defendant demurred.

Mr. Wallach and Mr. Jones, for the plaintiff. The statute of limitations of Massachusetts is no bar here. It is to be considered as a statute of limitations of a foreign state which does not extinguish the right, but the remedy only in that State. *Williams v. Jones*, 13 East, 439; *Purcell v. White*, 2 Mass. Rep. 84; *Nash v. Tupper*, 1 Cain. 402.

The plaintiff has never been in the District of Columbia; the statute of Maryland, therefore, cannot apply to him. He has always been within the exception of persons beyond seas. *Searight v. Calbraith*, 4 Dall. 327; *Conframp et al. v. Bunel*, 4 Dall. 419; *Ruggles v. Keeler*, 3 Johns. 263.

Mr. Key, contra. The *lex loci contractus* governs the case. Ballatine on Limitations, §4. The note being payable on demand, the cause of action arose as soon as the note was signed; and

consequently before the defendant left the state, so that the statute of limitations of Massachusetts had begun to run before he removed.

The COURT, (MORSELL, J., not sitting,) was of opinion that on a note payable on demand, the cause of action does not accrue so as to make the statute of limitations begin to run until a demand be made. That the removal of the defendant from Massachusetts, before the cause of action accrued, was a bar to the statute of limitations of Massachusetts; and the replication that the plaintiff was beyond seas, was a bar to the statute of Maryland.

TRAVERSE v. BEALL.

An umpire is not to be called in, until the original arbitrators have differed; and is then only to decide the points on which they differ.

EXCEPTIONS to an award.

Mr. Jones, for the defendant, objected, that the umpire (Collet) decided upon the whole case, and not merely upon the points on which the other two (E. Law and I. D. Barry) differed; and that he was appointed by them, and called in before they had disagreed.

Mr. J. Law, *contrà*, cited Kyd on Awards, 53, 138, 156, 159.

The COURT (*nem. con.*) was of opinion that the award was bad, because it did not appear that the original arbitrators had differed before they called in the umpire, but that he decided upon the whole case *ab initio*.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1815, AT ALEXANDRIA.

GRUNDY *v.* YOUNG.

A plaintiff at law, (in Alexandria, D. C.,) after dissolution of injunction, having taken out his execution, and obtained satisfaction of his judgment at law, cannot, in an action upon the injunction bond, recover the interest which accrued upon his judgment while he was delayed by the injunction.

DEBT upon an injunction bond, to recover interest on a judgment at law during the pendency of the injunction.

The condition of the bond was, that the complainant should pay "all money, and tobacco, and costs due, or to become due to the plaintiff in the action at law, and also such costs as shall be awarded against him, in case the injunction shall be dissolved."

Grundy, the plaintiff at law, after the dissolution of the injunction, took out an execution upon his judgment and obtained satisfaction.

The COURT (*nem. con.*) instructed the jury that the plaintiff cannot, upon this bond, recover interest upon the judgment at law, after having received full satisfaction of that judgment, under his execution.

UNITED STATES *v.* NEGRO TOM.

A slave convicted of manslaughter in Alexandria, D. C., may be punished by burning in the hand and whipping.

THE defendant, a slave, was convicted of manslaughter, and the judgment of the Court (*nem. con.*) was, that he should be burnt in the hand by the jailor in open court, and should be publicly whipped with thirty-nine stripes. See the Act of Virginia, 17th December, 1792, § 34, p. 190.

Scholfield v. Union Bank.

GREGG v. BONTZ.

IN Alexandria, D. C., the statute of limitations may be pleaded upon setting aside the office-judgment at the first term. See the Act of Virginia, December 12, 1792, § 28.

Mr. E. J. Lee, for the defendant.

(THRUSTON, J., absent.)

SCHOLFIELD et al. v. UNION BANK.

A stockholder of a bank, who has pledged his stock to the bank as collateral security for the payment of his notes not yet due, has a right to vote as a stockholder at an election of directors.

AN injunction had been granted to stay the election of directors of the Union Bank of Alexandria, upon the refusal of the committee of election to permit those stockholders to vote, whose stock was pledged to the bank as collateral security for notes not yet payable.

THE COURT confirmed the principle upon which the injunction was granted.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1815, AT WASHINGTON.

JENKINS *v.* PORTER et al.

Bail.

DEBT on a replevin bond.

The COURT (*nem. con.*) refused to order the defendant to give special bail, although in the action of replevin, there had been judgment for a return, &c.

CRAIK'S EXECUTORS *v.* HILTON.

Bail.

IN debt upon a bond of more than twelve years standing, the COURT (THRUSTON, J., absent,) ordered special bail to be given. The plaintiffs resided in Virginia.

Mr. Wallach, for the plaintiffs.

Mr. Law, for the defendant.

CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1816, AT ALEXANDRIA.

UNITED STATES *v.* PICKERING.

An indictment will not lie against a person for dealing with a slave without his master's consent, the statute having provided a different mode of prosecution.

THIS was an indictment for dealing with a slave without the consent of his master, contrary to the Act of Virginia of 17th December, 1792, § 16, p. 188.

Mr. E. J. Lee, for the United States.

Mr. Taylor, for the defendant.

THE COURT (THRUSTON, J., absent,) decided, upon the authority of the *United States v. Jesse Simms*, 1 Cranch, 252, that an indictment will not lie; the statute having directed the prosecution to be by action on the case by the master for fourfold the value of the article bought or sold, and a penalty of \$20 to be recovered by any person who will sue for the same, &c.

JACOBS *v.* LEVERING.

A commanding officer of the militia has no lawful authority to impress the horse of a citizen, even in time of war.

TRESPASS for impressing the plaintiff's horse.

Mr. J. D. Simms, for the defendant, offered a witness to prove an order from General Young, commanding the militia, to impress horses.

THE COURT (THRUSTON, J., absent,) decided that such an order would be no justification.

Mr. E. J. Lee, for the plaintiff.

M'Clean v. Fowle.

M'CLEAN v. FOWLE.

A declaration for a libel charging the plaintiff with an attempt to put two votes into the ballot-box at a corporate election, must contain an averment of the by-law under which the election was held.

ACTION upon the case for a libel charging that a neighbor of the printers had been detected in an attempt to put two votes into the ballot-box, and that "the name and the proof are left with the printer."

Verdict for the plaintiff, \$271⁷⁵/₁₀₀.

Mr. Swann, for the defendant, moved in arrest of judgment, and contended, that the publication contained no libellous matter, no reflection on the plaintiff's moral character, no charge of turpitude, nor does it set forth the election law so as to make it appear that the plaintiff had not a right to put in two votes. This cannot be aided by innuendo. *Holt v. Scholefield*, 6 T. R. 691. The Court cannot judicially notice a by-law not pleaded. 6 Bac. Abr. 375; *Rex v. Horne*, Cowp. 683; 2 Chitty's Pleadings, 256; 1 Sand. 243; Bac. Abr. Slander, 2. There is nothing in the libel to designate the plaintiff as the object of it; and this cannot be aided by innuendo. 4 Co. 17, (b.) And the averment in the declaration, that the libel was written of and concerning the plaintiff, does not authorize him to prove by evidence *dehors* the libel, that the plaintiff was the person meant.

Mr. Mason and *Mr. E. J. Lee*, for the plaintiff, contended that the whole tenor of the libel showed that it meant to charge the plaintiff with an illegal act, an act of turpitude; and this is sufficient to maintain the action. *J'Anson v. Stuart*, 1 T. R. 748; *Bell v. Stone*, 1 B. & P. 331; *Savile v. Jardine*, 2 H. Bl. 531; 5 Co. 125; *King v. Lake*, Hardres, 470; *The King v. Philipps*, 6 East, 471.

The COURT took time to consider, and at November term, 1816, (THRUSTON, J., absent,) arrested the judgment, for want of an averment of the by-law respecting the election.

CIRCUIT COURT OF THE UNITED STATES.

JUNE TERM, 1816, AT WASHINGTON.

WILLIAM STONE v. EDWARD STONE.

The defendant upon *non assumpsit*, may give in evidence a former recovery of judgment against him upon an attachment in a court in Virginia; and such former judgment is a good bar to the action here.

ASSUMPSIT, for money had and received.

The defendant, at the trial, upon *non assumpsit*, produced a record of a judgment by attachment against him, in Virginia, for the same cause of action, at the suit of the plaintiff, and prayed the Court to instruct the jury that if they were satisfied by the evidence that it was for the same cause of action, the plaintiff could not recover in this suit, which instruction the COURT gave. (THRUSTON, J., absent.)

Mr. Wiley, for the plaintiff. Mr. Jones and Mr. Key, for the defendant. Motion by the plaintiff's counsel, for a new trial, on the ground of misdirection of the jury by the Court. Refused.

HOLMEAD v. CORCORAN.

In trespass, when the defence is on warrant, the plaintiff is not permitted to give evidence of trespasses committed at a place not located on the plats; nor outside of the plaintiff's lines as located by him on the plats, although, by his title he had a right to locate them so as to include the place where, &c. The plaintiff is bound by his location, and cannot claim land not included therein. The plaintiff cannot recover unless he was in possession of the land at the time of the alleged trespass.

The Court will not receive evidence of the declaration of jurors, that they assessed the damages by taking the average of the sums put down by each juror respectively.

TRESPASS, *quare clausum fregit*. Defence on warrant.

The COURT (THRUSTON, J., absent, and MORSELL, J., sitting *pro formâ*, by consent of the parties, he having been of counsel in the cause,) decided that the plaintiff should not give evidence of trespasses at a place not located on the plats, nor outside of the lines of "Pleasant Plains" as located by the plaintiff on the

plats; although the plaintiff, by his title, had a right to locate "Pleasant Plains," so as to include the place where, &c., being of opinion that the plaintiff, in this suit, is bound by his location, and cannot claim, as part of "Pleasant Plains," land not located by him on the plat, as such, and that the plaintiff could not recover, unless he was in possession at the time of the alleged trespass.

Verdict for plaintiff. Damages, 170 dollars.

Mr. Wiley, for the defendant, moved for a new trial on the ground of misbehavior of the jurors in taking the average of damages put down by each juror, and making that the amount of damages found for the plaintiff. The motion was grounded upon the affidavit of a person who heard one of the jurors state the fact.

Mr. Jones and *Mr. Key*, *contrà*. No evidence of what a juror said after giving the verdict ought to be received by the Court. No juror should be permitted to criminate himself or his fellows. The evidence must come from some other source. *Vasie v. Delaval*, 1 T. R. 11; *Barnes*, 438, 441.

If, after ascertaining the average, the jury agreed to find it as the plaintiff's damages, it was no misbehavior.

The COURT (MORSELL, J., not sitting,) was of opinion that such evidence ought not to be received, and overruled the motion for a new trial. (See *Peake*, N. P. 187, Amer. Ed., and *Selden's Practice*.)

JENKINS v. BOYLE.

The acknowledgment of the original cause of action, accompanied by a refusal to pay unless compelled by law, will not take the case out of the statute of limitations.

ASSUMPSIT, upon a promise in writing to pay the debt of another if the latter did not pay in ninety days. The letter containing the promise was shown to the defendant, who admitted the letter to be his, but said the plaintiff ought to get the money from the third person, and that he would not pay unless compelled by law.

The COURT (THRUSTON, J., absent,) directed the jury that it was not a sufficient promise to take the case out of the statute of limitations, under the decision of the Supreme Court of the United States, in the case of *Clementson v. Williams*, 8 Cranch, 72.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1816, AT ALEXANDRIA.

DENNY *v.* HENDERSON.

The act of limitations runs in favor of an insolvent debtor notwithstanding his discharge under the insolvent act.

THIS was a chancery attachment against the effects of Henderson, in the hands of Mills and others. Henderson appeared and pleaded the statute of limitations. This suit was brought in 1812. The plaintiff replied that Henderson, in 1806, took the benefit of the insolvent act, and returned this as a debt; and that in 1812 he acquired property enough to satisfy this debt. To this replication there was a general demurrer and rejoinder.

Mr. Swann, for the plaintiff, contended that the insolvent act gives a new right of action upon the defendant's acquiring property, notwithstanding the act of limitations; that is, that after the discharge under the insolvent act, the statute of limitations does not run.

Mr. Taylor, for the defendant.

The COURT sustained the demurrer to the replication and rendered judgment for the defendant on the plea of limitations.

At April term, 1819, two other cases were decided in the same way, viz.: *Beverly v. Henderson*, and *Bowie v. Henderson*.

DEAN *v.* MARSTELLER.

The holder of a promissory note, in Alexandria, D. C., has no equity against a remote indorser, unless he has used due diligence to recover the money from the parties who were liable to him at law upon the note.

BILL IN EQUITY. The complainant held a note made by James Wilson, payable to John Tucker, chairman of a marine insurance association, and indorsed by him, by William Yeaton,

and by the defendant, Marsteller, for \$610.72 given by Wilson to the association to secure the repayment of that sum in case he should not, within a certain time, produce satisfactory proof of his loss on the ship Governor Strong, for which loss he claimed indemnity under a policy of insurance, and on account of which loss that sum of money had been advanced to him by the association with the assent of the defendant, but contrary to the will of the plaintiff, who, as well as the defendant, Marsteller, was a member of the association. In 1811, it had been decided, in a suit by Wilson against the association, that they were not liable for the loss. Before the note became due Wilson died insolvent; after which, and after the decision against Wilson in his action upon the policy, and after the complainant had failed in a suit against Tucker, the chairman of the association to recover the plaintiff's share of the money thus advanced to Wilson without his consent, the association, being indebted to the plaintiff and others, for the money thus advanced to Wilson, ordered this note of Wilson's, thus indorsed, and which had become payable November 1st, 1805, to be assigned to the complainant, which was done accordingly. The complainant, in his bill, after stating the foregoing facts, avers, that in consequence of the decision against Wilson in his action upon the policy, and his insolvency, the defendant, who is a remote indorser as to the complainant, (the intermediate indorsers being Tucker, the chairman of the association, and William Yeaton,) became liable to the complainant for the amount of the note, and as he cannot maintain an action at law against the complainant for the amount of the note against this defendant, his only remedy is in equity.

The answer of Marsteller denies that the note had been assigned to the complainant by order of the association, and avers that it was delivered to him in violation of their rules; and that the complainant had only a claim to some distributive share of the funds of the association, but not to the amount of the note. That after the note became payable it remained some years in the possession of the association as their property. That Wilson was bound to pay it at maturity, unless he should, before that time, produce evidence of the loss, satisfactory to the association. That the association never took any compulsory measures to obtain payment from Wilson's estate, and that if they had, he (the defendant) believes that the note would have been paid; but that in consequence of their neglect the debt has been lost.

The cause was set for hearing on the bill, answer, and exhibits.

CRANCH, C. J. It is difficult to perceive wherein the equity of this case consists. The suit is against a remote indorser, but the reason for not resorting to the intermediate indorsers is not stated.

Peyton v. Veitch.

I do not perceive that it follows, that because a person has not relief at law, he must necessarily have a remedy in equity; yet that seems to be the only ground of equity relied upon in the bill. It does not appear, from the bill, that the defendant had notice of the non-payment of the note by Wilson or his administrator, so as to become liable at law; and if not liable at law, I see no ground to charge him in equity. But if he had notice, yet he was discharged in equity by the negligence of the complainant and those under whom he claims, in not proceeding to enforce payment from Wilson's estate.

MORSELL, J., concurred. THRUSTON, J., absent.

PEYTON v. VEITCH *et al.*

It is not necessary that a magistrate who takes a deposition under the Act of Congress, should certify that he was not of counsel with either party.

It is competent for the plaintiff to give evidence of orders given to him in former voyages, in order to raise a presumption that similar orders were given in the voyage in question.

The caption of the deposition must name all the parties in the suit.

If the supercargo violates the laws of the foreign country by making short entries of the homeward bound cargo, and thereby subjects the vessel and cargo to seizure and condemnation, and pays a sum of money to obtain the release of the property, such violation of the laws of the foreign country will not prevent the supercargo from recovering from the owners the sum of money thus paid for the release of the property, unless it was paid in violation, also, of the laws of that country; in which case, he cannot recover.

THIS was an action of *assumpsit* brought by Thomas W. Peyton, against Richard Veitch and Anthony Crease, joint merchants, trading under the firm of Richard Veitch & Co., Jonah Thompson and Craven P. Thompson, joint merchants, trading under the firm of Jonah Thompson & Son, and Jacob Hoffman, to recover the sum of \$4,000 paid by the plaintiff to redeem the schooner Alert and cargo, which had been seized as forfeited, in Curaçoa, for violation of the laws of that place, by short entries of the cargo taken in there for the homeward voyage.

The COURT (in the absence of CRANCH, C. J.,) had decided that it was not necessary that the magistrate who takes a deposition under the Act of Congress, should certify that he is not counsel for either of the parties.

It having been proved that the usual course of trade to Curaçoa was to enter and clear by short invoices, so as to evade the payment of duties, and that this course was winked at by the revenue officers of the place, the plaintiff offered evidence that the defendant Veitch had given him orders to that effect, in former

Peyton v. Veitch.

voyages, in order that the jury might draw an inference that similar orders had been given to the plaintiff in the present case.

The COURT (CRANCH, C. J., *contrà*.) admitted the evidence.

Mr. Taylor, for the plaintiff, objected to the defendants' depositions, that they did not appear to have been taken in this cause, the names of three of the defendants having been omitted in the caption.

The COURT (*nem. con.*) rejected them on that ground.

Mr. E. J. Lee and *Mr. Swann*, for the defendants, contended that the money was paid in an illegal transaction, and therefore could not be recovered, and prayed the Court to instruct the jury that if they should believe, from the evidence, that the plaintiff had violated the law of Curaçoa, and thereby subjected the cargo to seizure and condemnation, and that the plaintiff paid to the revenue officer the sum of \$4,000 to release the vessel and cargo from such seizure and condemnation, the plaintiff had no right, in this action, to recover any part of the money so paid.

Which instruction the COURT (*nem. con.*) refused to give, because the prayer did not state that the payment of the \$4,000 for the release of the vessel and cargo, was contrary to the law of Curaçoa, or in violation of the duty of the officer who received it; although the seizure was for a violation of the law of that place.

Mr. Jones, for the plaintiff, then prayed the Court to instruct the jury, in substance, that if the plaintiff acted in conformity with the defendants' instructions, and according to the usage and course of the trade, in making the short entries which caused the seizure, and that by paying the \$4,000 he made a saving to the defendants of more than double that sum, and that the payment was necessary to preserve the vessel and cargo to the defendants, the plaintiff was entitled to recover in this action the money so paid.

Which instruction the COURT refused to give, unless with this proviso, that it should not appear to the jury, by the evidence, that such payment was contrary to the laws of the island of Curaçoa.

Mr. E. J. Lee, for the defendant, then prayed the Court, in effect, to instruct the jury, that if they should believe, from the evidence, that the \$4,000 were paid to the revenue officer of Curaçoa as a *bribe* for releasing the vessel and cargo without the knowledge or consent of the Governor of the Island, the plaintiff had no right to recover, in this action, any portion of the money so paid.

Which instruction the COURT (THRUSTON, J., *contrà*.) gave as prayed.

Ex parte Deane.

Bills of exception were taken, but no writ of error prosecuted.

Upon the question whether the illegality of the payment should prevent the plaintiff from recovering, the defendants' counsel cited 1 Esp. N. P. 89, 21 and 23; *Mabin v. Colson*, 4 Dall. 298; *Belding v. Pitkin*, 2 Caines, 147; and the plaintiff's counsel cited *Holman v. Johnson*, Cowp. 341; *Digges v. Lawrence*, 3 T. R. 454; *Waymell v. Reed*, 5 T. R. 599, and Esp. N. P. 20, Am. Ed.

Ex parte JOSEPH DEANE, in behalf of his Slaves.

The Common Council of Alexandria has no authority to make by-laws operating beyond the limits of the town, as described in the Acts of Virginia, of December 13, 1796, and January 8th, 1798, and the jurisdiction of the mayor is confined to the same limits.

The Corporation of Alexandria cannot enforce its by-laws by corporal punishments.

THIS was a motion to the Court for a *habeas corpus* to bring up the slaves of Joseph Deane, who had been committed by the mayor of the town for the supposed violation of a by-law prohibiting the nightly meeting of slaves, &c., and the question was, whether the jurisdiction of the mayor and common council extended to the northward of the range of lots on Montgomery street.

Mr. Taylor, for Mr. Deane. By the charter of 1779, the judicial power of the corporation extended half a mile beyond the limits of the town, but their legislative power was confined to those limits. They had power "to make by-laws and ordinances for the regulation and good government of the said town," "to be observed and performed by all manner of persons residing within the same, under reasonable penalties and forfeitures, to be levied by distress and sale of the goods of the offenders."

The Act of 1785 did not enlarge the limits of the town, but provided, that when the proprietors of lands within a certain district "round the said town" shall incline to lay out the same in town lots for the purpose of building thereon, they shall be laid out so as to correspond with the streets of the town. The Act of 1786 provides "That the limits of the town of Alexandria shall extend to and include, as well the lots formerly composing the said town, as those adjoining thereto, which have been and are improved."

The Act of the 13th of December, 1796, provides, "Whereas several additions of lots contiguous to the town of Alexandria, have been laid off by the proprietors of the land, in lots of half an acre each, extending, to the north, to a range of lots on the north

Ex parte Deane.

side of a street called Montgomery; upon the south, to the line of the District of Columbia; upon the west, to a range of lots on the west side of West street; and on the east, to the river Potomac; that many of the lots in the said additions have already been built upon, and many more will soon be improved; and whereas it has been represented to the General Assembly, that the inhabitants residing on the said lots are not subject to the regulations made and established for the orderly government of the town, and for the preservation of the health of the inhabitants, by the prevention and removal of nuisances, upon which their prosperity and well being does very much depend: Sect. 1. Be it therefore enacted, that each and every lot and part of a lot within the aforesaid limits, on which, at this time, is built a dwelling-house of at least sixteen feet square, or equal thereto in size, with a brick or stone chimney, and that each and every lot within the said limits, which shall hereafter be built upon, shall be incorporated with the said town of Alexandria, and be considered as part thereof."

The 2d section provides that the mayor and commonalty may compel the proprietors of lots within those limits, and not incorporated with the town, to remove nuisances in the same manner as if the lots were within the town.

The Act of the 8th of January, 1798, recites, that "whereas by an Act of Assembly passed in 1796, entitled," &c., "it is enacted that certain improved lots and all others, as they become so improved, within the bounds in the said act mentioned, be added to and made part of the said town of Alexandria, thereby leaving out of the jurisdiction of the said mayor and commonalty of the said town, the unimproved lots within the limits aforesaid, as long as they shall so remain unimproved; by which means the prosperity of the said town is in a great degree prevented." "Be it enacted that the unimproved lots within the limits aforesaid, shall be and are hereby incorporated with, and considered as a part of the said town of Alexandria, and subject to the same regulations as the other part thereof."

By the Act of Congress of the 25th of February, 1804, [2 Stat. at Large, 257,] "to amend the charter of Alexandria," it is enacted, (§ 4,) "That the jurisdiction of the said common council shall extend to the limits heretofore prescribed by law and exercised by the mayor and commonalty," and by the 5th section "shall have power to make all laws which they shall conceive requisite for the preservation of the health of the inhabitants and for the regulation of the morals and police of the said town, and to enforce the observance of their laws by reasonable penalties and forfeitures, to be levied upon the goods and chattels of the offender;" "pro-

Ex parte Deane.

vided that such laws shall not be repugnant to, or inconsistent with the laws and Constitution of the United States."

By the Act of the 27th February, 1801, [2 Stat. at Large, 103,] all the judicial power of the corporation was abolished, and the new charter of 1804 does not extend the jurisdiction of the corporation beyond the limits of the town, except to the poor-house, and the ten acre lot on which it stands.

The lot on which the meeting of negroes was held, was at some distance north of the range of lots on Montgomery street.

Mr. E. J. Lee (the mayor) contended that the lot was within the jurisdiction of the corporation, by virtue of the Acts of 1785, 1786, 1796, and 1798, and that the by-law was an amelioration of the general law of Virginia, because it allowed an alternative of fine or corporal punishment; whereas the law of Virginia inflicted corporal punishment only.

The COURT (*THRUSTON, J.*, absent,) was of opinion that the common council had no authority to make by-laws operating beyond the limits of the town, as described in the Acts of 1796 and 1798, and that the jurisdiction of the mayor was confined to the same limits, and that the corporation could not enforce its by-laws by corporal punishments.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1816, AT WASHINGTON.

CRAIG'S ADMINISTRATRIX v. REINTZEL.

A surety in the administration bond is a competent witness for the administrator, plaintiff.

JOHN WILSON, a surety in the plaintiff's administration bond, was offered as a witness for the plaintiff.

Mr. Jones and *Mr. Wiley*, for the defendant, objected that the witness was interested, because if the plaintiff failed to support the action, she would be liable for costs, and the witness, also, as her surety.

Mr. Key, for the plaintiff.

The COURT (*nem. con.*) overruled the objection. If the plaintiff should be liable to costs *de bonis propriis*, the surety is not liable at all; if *de bonis decedentis*, the surety will not be liable until a *devastavit* shall have been established; and that liability is too contingent and too remote to affect the competency of the witness. *Davies v. Davies's Executrix*, ante, 105.

ORMSBY v. TINGEY.

A copy from the records, of a deed of personal property, which derives no validity from being recorded, is not competent evidence.

ASSUMPSIT, against the defendant, as indorser of T. Craven's note.

Mr. Jones, for the plaintiff, offered to read, in evidence, a copy from the record of a deed of personal property, from Craven to Tingey, in trust, to secure Tingey; the property to remain in the possession of Craven until Tingey should be liable, &c. The deed was not recorded within twenty days, as required by the Act of Maryland, 1729, c. 8, § 5.

The COURT decided that, inasmuch as the deed could not obtain validity by being recorded after the twenty days, a copy from the record was not competent evidence.

SHARPLESS, Bail of Okely, v. KNOWLES, Bail of Okely.

Bail, in Pennsylvania, may follow their principal into the District of Columbia, and there take him out of the custody of the person who has become bail for him in that district; and if the principal be brought into the Circuit Court of that district to be surrendered to the marshal, he will be ordered by the Court to be delivered up to the Pennsylvania bail.

ON the 18th of January, 1817, the following entry was made upon the minutes of the Circuit Court of the District of Columbia, for the County of Washington.

“John Okely, a citizen and inhabitant of the District of Columbia, having been arrested for debt in Philadelphia, in the State of Pennsylvania, by a writ from the court of Philadelphia county, Jesse Sharpless, a citizen of Pennsylvania, at the request of the said Okely, became his bail. The said John Okely afterwards came to the county of Washington, in the District of Columbia, where he was arrested for debt by a writ issued from the Circuit Court for that district, in which writ Henry Knowles, a citizen and inhabitant of the District of Columbia, became his bail. Judgment having been rendered in the County Court of Philadelphia against the said John Okely, in the suit in which the said Sharpless was bail, he took a bail-piece from that court, and came to the county of Washington, in the District of Columbia, and on the 6th of January, 1817, showed the said bail-piece to the said John Okely, and took him into his custody, and required him to go to Philadelphia county aforesaid, to be there surrendered according to the laws of Pennsylvania, in discharge of the said Sharpless as his bail. The said Okely promised to settle the business, and upon the faith of that promise, the said Sharpless refrained from taking the said Okely away by actual force, but left him in his, the said Okely's, own house; after which, on the same day, the said Okely gave notice to the said Knowles, his other bail, of the said demand of the said Sharpless, and the said Knowles, being then at court and engaged as a juror in the trial of a cause in the Circuit Court of the District of Columbia, the counsel of the said Knowles directed the said Okely to apply to the clerk of the said court for a bail-piece; who issued the same; which being delivered to the said Okely, he afterwards, on the same 6th day of January, 1817, delivered it to the said Knowles, who thereupon took the said Okely into his custody, as bail as

aforesaid, but did not actually confine the said Okely, but permitted him to return and remain at his own house in the county of Washington aforesaid. On the morning of the 8th of January, 1817, the said Sharpless called at the said Okely's house with a carriage and two assistants, and took the said Okely into his custody, and informed him that he should compel him to go with him to Philadelphia, for the purpose of surrendering him there, in his discharge as aforesaid. While the said Okely was thus in custody of the said Sharpless, the said Knowles, being sent for by Okely, came and claimed him as being in his custody, as bail as aforesaid, and gave the said Sharpless a written notice thereof. Whereupon the said Sharpless agreed with the said Okely and Knowles that he would carry the said Okely into the Circuit Court for the District of Columbia, then in session in the county of Washington, that the said court might decide whether he was lawfully in custody of the said Sharpless, or not; and accordingly brought the said Okely into the court-room, the said Knowles being permitted by the said Sharpless to accompany them in the same carriage, and entering the court-room at the same time. While the parties were thus in the court-room, the said Knowles, by his counsel, stated to the court that he offered to surrender the said Okely to the custody of the marshal, in discharge of the said Knowles, as bail of the said Okely, in the suit aforesaid; to which surrender the said Sharpless objected, contending that the said Okely was lawfully in his custody, as his bail, in manner aforesaid. Whereupon (the Court taking time to advise,) the said Okely was, by consent of the parties aforesaid, and by order of the Court, committed to the custody of the marshal of the District of Columbia, for safe keeping, without prejudice to the rights of the contending parties, until the Court should be advised thereon.

But the COURT, after hearing the argument of counsel, and taking time to consider thereupon, ordered and directed the marshal of the district to deliver the said John Okely into the custody of the said Jesse Sharpless. And the marshal having represented to this Court, that since the said Okely was brought into this Court as aforesaid, and while he was remaining in custody of the said marshal for safe keeping as herein stated, by the Court with the consent of the parties, a writ had been put into his hands by one Alpheus J. Hyatt, against the said Okely, and having prayed the direction of the Court as to the service of the said writ under said circumstances, the COURT were of opinion, and so directed the said marshal, that the said Okely could not lawfully be arrested under such writ, and that, notwithstanding such writ, the said Okely should be delivered up by him, as above ordered, to the said Sharpless."

In the argument, *Mr. Jones*, for Knowles, cited 1 Tidd, 190; 7 Mod. 231; *Ex parte Gibbon*, 1 Atk. 239; *Marshall v. Vincent*, Moore. 400; *Winder v. Shirley*, Doug. 45; *Merrick v. Vaucher*, 6 T. R. 50; *Wood v. Mitchell*, 6 T. R. 247; *Postel v. Williams*, 7 T. R. 517; *Cathcart v. Cannon*, 1 Johns. Ca. 28; and *Bignel v. Forrest*, 2 Johns. 482; and contended that bail was only the substitute for the actual walls of the jail. That the party is still in custody, and is at liberty only at the will of the bail. That Okely was in custody of the law as much as if he had been in the keeping of the marshal, and that foreign bail had no more right to take the prisoner from the custody of his bail, than to take him out of the walls of the prison. And that Sharpless would be exonerated by the impossibility of having the defendant at the court in Philadelphia, when he was in custody of the law in this district.

Mr. Key, contrà, cited the Constitution of the United States, and contended that Sharpless had the prior right. That in other respects their rights were equal. That the States are not foreign to each other; and that the citizens of each State are entitled to all privileges and immunities of citizens in the several States. That Sharpless has the same right to take Okely and surrender him as if he had been his bail in this district. That if this were not the case, bail would never be safe, as the debtor might slip away into another State and procure himself to be arrested and held to bail there, and so from time to time during his whole lifetime.

The COURT (CRANCH, C. J., *contrà*,) was of opinion that Sharpless had such a right to the person of Okely as to prevent Knowles from surrendering him in discharge of himself.

CRANCH, C. J., was of opinion that Okely was in the custody of his bail here, who had a right to hold him, and surrender him. When the laws of two States come in conflict, the laws of the State, in which the parties are, must prevail.

CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1817, AT ALEXANDRIA.

SIMPSON *v.* LEGG.

Judgment by motion, on notice, cannot be obtained upon a bond given to secure rent upon an attachment on a suggestion that the tenant is about to remove.

MOTION for judgment on a bond given to secure rent upon an attachment issued upon a suggestion that the tenant was about to remove. (See Virginia Statute 29th November, 1792, § 8, p. 154.)

Mr. Swann, for the defendant. The Act of Assembly does not authorize summary judgment on such a bond. And so it was decided by the COURT (THRUSTON, J., absent.)

ABEDNEGO ADAMS, Assignee of Thomas Peake, *v.* C. F. WHITING, Administrator of Charles Little.

A declaration upon a promise made by the defendant as administrator, must aver assets, in order to charge him personally *de bonis propriis*.

THE declaration charged that the defendant, administrator of Charles Little, made his promissory note to Thomas Peake, and thereby as administrator of the said Charles Little, promised to settle with him for sundry taxes and clerk's notes due from the late Charles Little for himself individually, and as executor and administrator of others, to the amount of \$47.74; which note the said Thomas Peake assigned to the plaintiff, of which the defendant had notice; by means whereof, and by force of the statute, the defendant became liable to pay to the plaintiff the said sum of money in the said note specified, according to the tenor and effect thereof and of the said assignment, and being so liable, the defendant, in consideration thereof, promised the plaintiff to pay him the said sum of money. Nevertheless, the defendant, although often requested, has not paid, &c.

To this declaration there was a general demurrer and joinder.

United States v. Rounsavel.

Mr. Taylor, for the defendant, cited *Hawkes and wife v. Saunders*, Cowp. 289, and *Atkins and wife v. Hill*, Id. 284.

Mr. Fitzhugh, *contra*, cited *Morris v. Lee*, 2 Ld. Raym. 1596, and *Grant v. Vaughan*, 3 Burr. 1516.

The COURT (THRUSTON, J., absent,) decided that the declaration was bad for the want of an averment of assets; inasmuch as the promise was made by the defendant as administrator, and the declaration sought to charge him personally *de bonis propriis*.

UNITED STATES v. NEGRO HENRY BOWEN.

Bank-notes are not goods and chattels, nor money, and stealing them is no offence at common law.

INDICTMENT, at common law, for stealing a bank-note. Verdict, guilty.

Judgment arrested. The COURT (THRUSTON, J., absent,) being of opinion that it was no offence at common law to steal a bank-note.

UNITED STATES v. ROBIN HOOD.

A conviction of the offence of keeping a faro-bank contrary to a by-law of the corporation of Alexandria, is no bar to an indictment at common law for keeping a disorderly house, supported by the same evidence.

INDICTMENT, at common law, for keeping a disorderly house.

The evidence was that he kept a faro-bank in a room at McLaughlin's tavern. It also appeared that he had been convicted and fined, by the mayor of Alexandria, under a by-law of the corporation for keeping the faro-bank.

Mr. R. J. Taylor, for the defendant, contended that that conviction was a bar to the present prosecution.

But the COURT (THRUSTON, J., absent,) decided that it was no bar. He offended against two laws. The by-law could not repeal the general law of the land. It is not the same offence.

UNITED STATES v. ROUNSAVEL.

An information will not lie upon a presentment of a grand jury for public gambling contrary to the Virginia Statute of 8th December, 1792, c. 96, § 5, p. 175.

RULE to show cause why an information should not be filed

 Fairfax v. Hopkins.

upon the presentment of the grand jury for playing at *vingt un* at a tavern, contrary to the Act of Assembly.

By the COURT. The statute has prescribed the mode of prosecution, and no other can be sustained. See *United States v. Willis*, at November term, 1808, (1 Cranch, C. C. 511,) and *United States v. Simms*, in Supreme Court of the United States, 1 Cranch, 252.

Rule discharged.

FERDINANDO FAIRFAX v. JOHN HOPKINS.

A trustee appointed by a debtor to sell the mortgaged premises to the highest bidder, is bound to see that the sale is fairly made, and that there is a real competition. He is as much bound to take care of the interest of the debtor, as of the creditor; and if he finds only sham competitors, he ought not to proceed with the sale at that time, but adjourn and give a new notice. If there were no competitors at the sale, and the creditor has bought the property at his own price, and recovered judgment at law for the balance of the debt, the Court will enjoin that judgment until the real value of the land bought in by the creditor, and the circumstances of the sale shall be ascertained upon final hearing.

THIS was a bill for an injunction to stay execution upon a judgment at law recovered in the Circuit Court of the District of Columbia, by Hopkins against Fairfax.

Upon the motion to dissolve the injunction, CRANCH, C. J., delivered the opinion of the Court, May 17th, 1817.

The facts of this case appear to be as follows:—On the 27th of September, 1811, Ferdinando Fairfax, being indebted to John Hopkins in the sum of \$7,294, made a deed of trust to B. Taylor and T. Parker, for twelve hundred and sixty-seven acres of land in Jefferson county in Virginia, with power to them or either of them to sell the same for ready money to the highest bidder, after giving two months' notice of the time and place of sale in the newspaper printed in Charleston, in case F. F. should not pay the debt on the 1st of October, 1812. Mr. F. failed to pay on that day, and on the 9th of the same month the property was advertised for sale under the trust. At the sale there was no real bidder but Mr. Turner the agent of Mr. Hopkins. Mr. Humphreys and Mr. Dixon admit that they had not the money. Their bids therefore would not have been received. The land was, of course, struck off to Mr. Turner for Mr. Hopkins, at the price of \$5,320. Mr. Hopkins, in his letter to Mr. Turner, of the 13th of November, 1812, admits that the land was good security for the debt, and authorized Mr. Turner to bid to the full amount of the debt, interest, costs, and commissions. On the 13th of April, 1813, B. Taylor, one of the trustees, conveyed the land directly to Mr. Hopkins. After crediting the purchase-money, (\$5,320)

Fairfax v. Hopkins.

the balance stated to be due to Mr. Hopkins was \$2,780.95, for which he brought suit on the bond. Mr. Fairfax was arrested and not being able conveniently to give bail, made another deed of trust, in lieu of bail (not admitting any thing to be due) for two hundred and fifty acres of land in Loudon county. Judgment was recovered, and not being satisfied, the trustees of the Loudon land advertised it for sale at Leesburgh, on a court day. Only two bids were made; one by some person, as it seems, merely to set it up, at \$5 an acre; the other by Mr. Hopkins, Jr., in behalf of his father, to whom it was struck off at \$6 an acre. The only real bidder was Mr. Hopkins. The proceeds of this sale being credited (\$1,500) Mr. Hopkins took a *ca. sa.* against Mr. Fairfax for the balance, being about \$1,900. Mr. Fairfax filed this bill and obtained an injunction, which it is now moved to dissolve, upon the coming in of Mr. Hopkins's answer.

Mr. Hopkins admits that he has sold these last 250 acres of land, at about 10 dollars per acre, and that for the Jefferson land remaining unsold, being about 1000 acres, he would take the same price at long credits. Without taking into account the 267 acres of Jefferson land, which Mr. Hopkins has sold, he has 1000 acres worth 10 dollars an acre, 10,000 dollars, and has sold the Loudon land for about 2,500 dollars, making 12,500 dollars. The whole debt and interest to the 27th of September, next, would be a little less than 10,000 dollars, so that he has already received 2500 dollars more than his whole debt and interest. If we add the 267 acres of Jefferson land sold by Mr. Hopkins, perhaps at 10 dollars, it will make upwards of 5000 dollars more than the whole debt and interest.

A mere statement of the facts of this case shows its injustice. That a creditor should have the power of appropriating to himself, at his own valuation, the property of his debtor, strikes every one as unjust in the extreme, yet this has been the fact in the present case, and may be the fact in many like cases, if, by mere compliance with exterior forms, we can tie the bandage of law over the eyes of equity. In the present case, although the forms of the contract may have been pursued, so that, if a stranger had been the purchaser, his title would have been protected at law, yet, in substance, as between these parties, the contract has not been complied with. The land was to be sold to the highest bidder; meaning, unquestionably, the highest *bonâ fide* bidder; and unless there be at a sale, more than one such bidder, the sale cannot be made to the highest bidder; because where there is only one there can be no comparison. The word "highest" was used in order that there should be no sale unless there should be a real competition. Such is undoubtedly the intention of

the parties; and where the intention of the parties has not been fairly executed, a court of equity will interfere in cases where third persons have not acquired legal rights without notice of the equity. In the present case the rights of third persons do not interfere. The transaction has been entirely between the debtor and creditor. The creditor has, under the forms of law, appropriated to himself, at his own valuation, the property pledged. He has stood by and seen the property of his debtor sacrificed in consequence of his own pressure, and has even taken to himself the whole benefit of that sacrifice. He has gained all that his debtor has lost. Not contented with this he seizes the body of his debtor, and when this debtor asks a court of equity to look into his case, the creditor presents to the Court his shield of legal forms. We are told in the answer that we cannot question either the legality or the equity of the sale of the Jefferson lands, because that subject has been acted upon by the Chancery Court at Winchester. This may be so as it respects the title to those lands. The creditor may keep them, and perhaps his title may be unquestionable by this Court. But this Court is not bound, while inquiring whether the creditor shall be permitted further to prosecute his debtor, to shut its eyes to the facts in evidence before us. We are not forbidden to see that the creditor has, in fact, appropriated to himself those lands which he admitted to be good security for his debt; nor that he has also acquired other lands of his debtor at a very inadequate price. If those lands were good security while in the hands of the debtor, why should they not, in equity, be considered as good payment when they get into the hands of the creditor? We are not forbidden to see that the debt is in fact paid which the creditor seeks to enforce. We may not perhaps set aside the conveyance of the property to the creditor; we may not, perhaps, on final hearing, compel the creditor to account for a surplus, but we think we ought to continue the injunction till final hearing. It may then be time enough to inquire whether we can decree a perpetual injunction.

In cases like this, the trustee appointed by the parties is substituted for a master in chancery under the decree of a court of equity. The one is as much bound as the other, not only to see that the sale is fairly made, that is, that no fraud or deception be used, but to ascertain that there is a real competition; not a mere sham sale. He is not to suffer a creditor to bring with him a few nominal bidders, for the purpose of enabling him to take to himself the property at his own price; he is as much bound to take care of the interest of the debtor, as of the creditor; and if he finds only sham competitors, he ought not to proceed with

the sale ; but adjourn and give new notice. For these reasons the opinion of a majority of the Court is that the injunction should be continued till final hearing.

THRUSTON, J., concurred. MORSELL, J., doubted.

At November term, 1818, the cause having been set for hearing, on the same evidence, the COURT (THRUSTON, J., absent,) decreed the bill to be dismissed — that being the opinion of MORSELL, J. — and CRANCH, C. J., doubting as to the conclusive effect of the decree of the Court of Chancery in Virginia.

Mr. Jones, for the complainant. Mr. Swann, for the defendant.

UNITED STATES v. JOSHUA *alias* JOSEPH LAMBERT.

Upon a trial for bigamy in Alexandria, D. C., the bond given by the defendant to the Clerk of the Court at Richmond to obtain a marriage license, cannot be given in evidence on the part of the United States.

The fact that the person who performed the ceremony of marriage was a clergyman authorized to celebrate the rites of matrimony according to the laws of Virginia, may be proved by parol, as any other matter of fact *in pais*; and the record of the testimonial required by the Act of Virginia, of 22d December, 1792, c. 104, § 3, need not be produced; nor a copy thereof.

A person convicted of bigamy in Alexandria is entitled to the benefit of clergy: and may be burnt in the hand, and required to recognize for his good behavior.

Upon a trial for bigamy in Alexandria, the prisoner is entitled to a peremptory challenge.

THIS was an indictment for bigamy. The prisoner was allowed a peremptory challenge.

Mr. E. J. Lee, for the United States, offered a certified copy of the bond given by Lambert to the clerk of the Court of Hustings in Richmond to obtain a marriage license.

But the COURT (THRUSTON, J., absent,) rejected it.

Mr. Lee, offered the clergyman, the Rev. Mr. Courtney, as a witness to prove the first marriage, and parol evidence that he had been in the practice of celebrating the rites of matrimony nearly fifty years.

Mr. Mason and Mr. N. Herbert, for the defendant, objected that his testimonial to celebrate the rites of matrimony required by the Act of Virginia, of 22d December, 1792, c. 104, § 3, ought to be produced, as the best evidence of his authority; or a copy of it from the record.

But the COURT decided that the fact of his being a clergyman authorized to celebrate the rites of matrimony might be proved by parol as any other matter *in pais*. Thus the authority of a justice of the peace may be proved by reputation, and by the fact of his publicly acting as such, &c.

Verdict, guilty — recommended to mercy by the jury.

The COURT decided that he was entitled to the benefit of clergy, and sentenced him to be burnt in the hand, and to recognize in 500 dollars for his good behavior for one year, and to stand committed till the costs should be paid.

DANIEL SOMERS v. JOHN TAYLOE.

If a written contract between A. and B., for the delivery of corn, contain allusions to C. and D. tending to show their interest in the contract, parol evidence may be given to show that A. was the agent of C. and that B. was the agent of D., and that the contract was made by A. and B. for and in behalf of their respective principals; and the contract may be admitted in evidence in an action by C. against D. for the non-delivery of the corn which was the subject of the contract.

If the defendant positively refused to deliver the corn according to the contract, such refusal dispensed with the necessity of a demand on the part of the plaintiff, and of proof of the averment that he was ready at the landing to receive the corn.

THIS was a special action of *assumpsit*, for not delivering corn according to a written contract between Greenlow and Raymond. The declaration avers that Greenlow was the agent of Somers, and Raymond the agent of Tayloe.

Mr. Swann, for the defendant, objected to the contract being read in evidence on this declaration because the agreement does not show the agency of the parties; and no parol evidence can be given to explain the written contract.

Mr. Taylor and Mr. Lee, for the plaintiff, observed that the contract was not under seal, and was offered in connection with the letters of Mr. Tayloe acknowledging the contract as his and as made with Mr. Somers.

The COURT (*nem. con.*) was of opinion that as, in the contract, the corn is said to be the corn upon Colonel Tayloe's plantation called Oaken Brow, and as there are several other references in the contract to Colonel Tayloe and Mr. Somers, the plaintiff might give parol evidence of the agency of the parties.

Mr. Swann, for the defendant, moved the Court to instruct the jury that the plaintiff must prove a demand of the corn.

Mr. Taylor, *contra*. The defendant, by his letters of the 12th and 24th of June, declares that he will not deliver it; this absolved the plaintiff from his obligation to demand it.

The COURT (*nem. con.*) decided that the demand was waived by the defendant's declaration that he would not deliver the corn. One count of the declaration averred that the plaintiff was ready at the landing to receive the corn; and Mr. Swann prayed the Court to instruct the jury that, upon that count it was necessary that the plaintiff should prove that fact.

Rounsavel v. Scholfield.

But the COURT decided that the plaintiff need not prove that averment if he proves that the defendant waived the demand, by declaring that he would not deliver the corn if demanded.

Verdict for the plaintiff, 375 dollars.

RICHARD SLADE v. DANIEL MINOR.

In an action of trespass against the marshal of the District of Columbia for levying a distress for a militia fine, it is only necessary for him, in his justification, to prove those facts which give jurisdiction to the military court; and that it was regularly constituted, and imposed the fine.

The acts of such a court are presumed to be correct; and it is not competent for the plaintiff to show their irregularity.

An alien is not liable to militia duty.

Naturalization cannot be proved by parol.

THIS was an action against the deputy-marshal of the District of Columbia, for levying a distress for a militia fine, imposed by a battalion court of inquiry, under the Acts of Congress of the 3d of March, 1803, and 1st of July, 1812, [2 Stat. at Large, 215, 769,] "more effectually to provide for the organization of the militia of the District of Columbia."

Mr. E. J. Lee, for the plaintiff.

Mr. Taylor, for the defendant.

The COURT (THRUSTON, J., absent,) was of opinion, that it was only necessary for the defendant in his justification, to prove those facts which gave the battalion court of inquiry jurisdiction, and which showed that the tribunal was regularly constituted; and that having shown this, the acts of that court were to be presumed to be correct, and that it was not competent for the plaintiff to show their irregularity.

The Court also decided that an alien was not liable to militia duty, and that the naturalization of Charles Slade, the plaintiff's father, could not be proved by parol.

Verdict for plaintiff, \$56.

ROUNSAVEL v. SCHOLFIELD.

The person who knowingly takes a dishonored check payable to bearer, takes it subject to the drawer's equity against the person from whom he received it.

If the holder, at the time of his taking the check, knew that the person who gave it to him, had no right to give it, he cannot recover against the drawer.

ASSUMPSIT, for money had and received.

The plaintiff offered in evidence, a check drawn by the defend-

Swann v. Scholfield.

ant upon the Union Bank, payable to B. Baden, or bearer, which, having been the property of the Merchants Bank, was delivered to the plaintiff by the cashier of that bank, for value received.

Mr. Swann and *Mr. Mason*, for the defendant, offered evidence to prove, that the cashier of the Merchants Bank had no authority to deliver the check to the plaintiff, and that while it was the property of that bank, the defendant had offered to take it up and pay it in their own paper, which the cashier refused. That the plaintiff, when he received it, knew that it had been dishonored by the Union Bank, on which it was drawn.

Whereupon the COURT (*THRUSTON, J.*, absent,) upon the motion of the defendant's counsel, instructed the jury that if they should be satisfied by the evidence that the plaintiff, when he received the check, knew that the cashier of the Merchants Bank had no right to transfer it, he could not recover in this suit, and that if the plaintiff, when he took the check, knew that it had been dishonored by the bank on which it was drawn, he took it liable to all the equitable and legal defence which the defendant then had against the Merchants Bank.

W. T. SWANN, for the Real Estate Bank, v. JONATHAN SCHOLFIELD.

After a note is taken up by the indorser, its negotiability ceases, and he cannot, by transferring the note, assign his right of action at law, so as to enable the assignee to sue in his own name.

ASSUMPSIT, on the defendant's promissory note, indorsed by Thompson Simpson, and George Bruce, Jun. The note when due, was taken up by the discount of notes of Bruce indorsed by Simpson, and afterwards returned by Bruce to the bank, who brought suit in the name of W. T. Swann, as indorsee.

The COURT (*THRUSTON, J.*, absent,) instructed the jury, that after the note was taken up by Bruce, its negotiability ceased, and he could not assign his right of action at law to the plaintiff, so as to enable him to sue in his own name.

CIRCUIT COURT OF THE UNITED STATES.

JUNE TERM, 1817, AT WASHINGTON.

COMEGYSS, FALCONER, AND COMEGYSS, *v.* JOHN N. ROBB.

The Court will not grant leave to amend the writ, by changing the name of one of the plaintiffs.

Mr. Lockerman, for the plaintiffs, moved to amend the writ, by altering the name of one of the plaintiffs from Comegyss to Peerhouse.

The COURT (*nem. con.*) refused.

UNITED STATES *v.* ANDREW RAY.

The Independent Manufacturing Company of Baltimore might authorize their president and treasurer to issue promissory notes, having the form of bank-notes. in *bonâ fide* payment for materials furnished, and services rendered for the use of the company, if done without fraudulent intention.

But they had no right to pass them away for the purpose of putting them into circulation as a current circulating medium, and not in payment for materials, &c., for the use of the company in the ordinary course of their business as a manufacturing company, and if so issued and passed by the defendant as a circulating medium, with intent to defraud or injure any person, he is guilty of an indictable offence.

THIS cause was, by consent, tried upon the presentment, which was in these words:—

“District of Columbia, Washington County Court, June term, 1817. The grand jury for the body of the county afore-said, on their oaths present Andrew Ray, of Baltimore, styling himself president of ‘The Independent Manufacturing Company of Baltimore,’ for fraudulently passing and attempting to pass certain promissory notes in the form and appearance of bank-notes, stating them to be payable to _____ or bearer, by ‘The Independent Manufacturing Company of Baltimore,’ said Ray knowing such notes to be spurious and void; the funds and property of the said company not being bound to redeem or pay the same, they not being under the seal of the said company as

required by their charter, on the information of John Peter, Mayor of Georgetown, on or about the 29th of May last. John Ott, foreman."

Mr. Law, for the defendant, moved the Court to instruct the jury, that the facts proved did not amount to any crime or offence.

Mr. Jones, for the United States, contended that the corporation had no power to issue such notes; that they could only contract under their corporate seal; or that if they can issue promissory notes, it can only be for the purchase of materials, &c., in the regular course of their business as manufacturers.

The COURT (*THRUSTON, J.*, absent,) instructed the jury, that if they should be of opinion, from the evidence in this cause, that the traverser gave the notes in the presentment mentioned, in *bonâ fide* payment for materials, or articles purchased by him as the agent and for the use of the manufacturing company in the presentment mentioned, or for services *bonâ fide* rendered for the use of the said company, or in payment of his expenses as agent of the said company; and that he was, by a vote of the directors of the said company, instructed to use the said notes in that manner; and that the said notes were signed by him as president, and by Edward Gillespie, treasurer of the said company, by an order of the said board of directors, and that he was appointed by the said company as their agent to make such purchases or payments; and that he as agent as aforesaid, in making such payment, had no intention to defraud any person, then he was guilty of no offence in so uttering or passing, or paying away the said notes.

But if the jury should be of opinion, from the evidence in this cause, that the traverser passed away the said notes for the purpose of putting them into circulation, as a current circulating medium, and not in payment for goods, materials, services, or expenses for the use of the said company, in the ordinary course of their business as a manufacturing company, with a view to defraud or injure any person, then he was guilty of such an offence as would support an indictment.

Verdict, not guilty.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1817, AT WASHINGTON.

RIGGS v. MAGRUDER.

A contract for the sale of the notes of a private bank, is within the statute of frauds. A verbal agreement, which is to be put into writing and signed the next day, is not complete so as to bind either party, until reduced to writing and signed.

THE defendant agreed to receive of the plaintiff \$5000 of the notes of the Merchants Bank, (a private bank) if delivered in twenty days, and pay him for them \$4,900, in good current notes of the district banks. Each was to forfeit \$500 if he refused to comply; the agreement was to be reduced to writing, and signed the next day at the plaintiff's counting-room. The defendant refused to sign it the next day, or to carry it into effect. The plaintiff tendered the notes within the twenty days, and the defendant refused to receive them.

Mr. Swann, Mr. Key, Mr. Wiley, and Mr. Taney, for the defendant, contended that stocks were merchandise, and *a fortiori* the notes of a banking company, and therefore the agreement was void by the statute of frauds. 1 Comyn on Cont. 89; Roberts on Frauds, 172, 184, 186. But if not void by that statute, it was never complete as a contract, because it was to be reduced to writing and signed the next day, which was never done. Roberts, 6.

Mr. Lockerman and Mr. Jones, contra. Bank-notes are not merchandise, and therefore a sale of them is not within the statute. They cannot be the subject of larceny at common law. *Ann Gray's case*, Leach, Cr. Law, 234; *Horne's case*, Leach, 403. These bank-notes are mere choses in action. It was no part of the agreement that it should be reduced to writing. There was no *locus pœnitentie*.

THE COURT (THRUSTON, J., absent,) decided, that the agreement was void by the 17th section of the statute of frauds; and that if the jury should be of opinion from the evidence, that it was agreed between the parties that the oral contract should be reduced to writing the next day, and signed by the parties, and that it was not so reduced and signed, the contract was never complete.

JOHN LAW v. THOMAS EWELL.

A counsellor of this Court cannot support an action at law against his client for his fee as counsel, although he prove an express promise to pay it.
An attorney may recover his legal fee upon assumpsit.

ASSUMPSIT for professional services rendered by the plaintiff, who was an attorney and counsellor of this court. Besides his legal fees as attorney amounting to \$70, the plaintiff proved an express promise by the defendant to pay the plaintiff \$100 if the defendant should obtain a new trial in the case of Stull and others against him, which was obtained.

Mr. Taney and *Mr. Wiley*, for the defendant, contended that the plaintiff could not recover, in an action at law, his fees either as attorney or counsel. Not as attorney because the Maryland Acts of 1715, c. 48, § 10, and 1779, c. 25, § 17, give a summary remedy by distress and sale; not as counsellor, because, by the common law of England, in force in Maryland, on the 27th February, 1801, the fees of counsel were merely honorary, like those of a physician. In the case of *Dr. Chorley, v. Bolcol, executor*, 4 T. R. 317, it was taken for granted, (without any question,) by the Court and counsel, that counsellors at law can maintain no action for their fees, either at law, or in equity; and this is expressly stated by Blackstone, (3 Com. 28,) who refers to the case of *Moor v. Row*, 1 Rep. in Chanc. 38, where "the plaintiff being a counsellor at law brought his bill for fees due to him from the defendant, being a solicitor, and was to account with him at the end of every term. The defendant demurred. This court allowed the demurrer *nisi causa*. Demurrer affirmed and the bill dismissed." Blackstone says that the fees of counsel are given, not as *locatio vel conductio*, but as *quiddam honorarium*; not as a salary or hire, but as a mere gratuity which a counsellor cannot demand without doing wrong to his reputation. Peake, N. P. 122; and therefore counsellors are never required to give receipts for their fees.

Mr. Key, and *Mr. Law, contra*. Although a summary remedy is given for the legal fees of an attorney, yet that does not deprive him of his remedy by action at common law. Attorney's fees in England may be recovered in assumpsit. And in 1 Harris's Entries, 117, is a declaration in assumpsit by an attorney-at-law for the taxable fees. The law, as laid down by Blackstone, respecting counsellors' fees has never been adopted in Maryland; certainly never as to the services of a physician; and in England they rest on the same ground; a *quiddam honorarium*. Whenever there is a moral obligation, and an express promise to pay

Negro Thompson v. Clarke.

the cause of action is complete, and upon the general principles of the common law the action ought to be sustained. This court has decided that an attorney at law is not bound to argue a cause before the jury as counsel, for the legal attorney's fee.

The COURT (MORSELL, J., *contrà*;) was of opinion that the fee as counsellor could not be recovered at law; and (THRUSTON, J., *contrà*;) that the legal attorney's fee could be recovered in assumpsit.

Verdict for plaintiff, for \$70, the amount of his taxable fees as attorney for the defendant in several suits.

 NEGRO JO. THOMPSON v. WALTER CLARKE.

If a testator by his will manumits his slaves after a certain term of service, and the widow renounces the provision made for her by the will and adheres to her rights under the law of Maryland, and there is sufficient personal estate to satisfy her thirds without resorting to the slaves, they will be entitled to their freedom, although the executor should have assigned them to the widow in part satisfaction of her claim.

THIS was a petition for freedom. John Thompson by his will dated December 31st, 1804, devised, that if his wife should not have a child within nine months after his death, the petitioner, his slave, should be free after ten years service. The widow renounced the provision made for her by the will and adhered to her legal rights; and the executor assigned to her the petitioner in part of her thirds, there being other personal property enough to satisfy her claim without resorting specifically to the slaves. Those assigned to her did not exceed her proportion of the slaves.

By the Maryland act of 1798, c. 101, c. 13, § 2, the widow who renounces the provision made for her by the will is entitled to one third only of the personal estate after payment of debts.

By the Maryland act of 1796, c. 67, § 13, a person may manumit his slaves by his will, if the same be not in prejudice of creditors. By the Act of 1798, c. 101, c. 11, § 16, if the surplus, after payment of debts, consists of specific property, and the administrator cannot distribute it satisfactorily among the parties, the Orphans' Court may distribute it, or order it to be sold.

By the Act of 1729, c. 24, § 2, it is enacted that no negro, or other slave shall be sold by an executor or administrator, or taken in execution for any debt due from any testator or intestate, so long as there shall be other goods sufficient, &c.

Mr. Taney and *Mr. Key*, for the petitioner, contended that the right of the widow was not absolutely to a third part of the specific property; but only one third in value of the personal estate.

That the surplus of the personal estate vests specifically in the executor on whom the legal title and estate of the personal property devolves by law, and he is answerable to the respective legatees. That if the slaves had been specifically bequeathed, and there had been other property enough left to satisfy the widow's thirds, the rights of the specific legatees would be protected, and the executor could not assign to the widow any part of the property thus specifically bequeathed. That the slaves must be considered as specific legatees, and their rights protected by the same principle. They cited Jacob's Law Dict. tit. Dower, to show the distinction between dower and thirds, and that the widow had no specific title to the property. And 3 Bac. Ab. tit. Executors and Administrators, p. 67, to show that the assent of the executor was necessary to complete the title to a legacy; and p. 426, to show that when a specific legacy is taken in execution the legatee may recover the value.

Mr. Jones, *contra*, contended that the rights of the widow were paramount to the will. The testator, in his lifetime, might dispose of all his personal estate, but he could not, in his will deprive her of her thirds. She claims as a distributee. As to her, her husband died intestate. Distributees have a right to the specific property which is to be distributed; and it is to be distributed specifically if possible. They cannot be compelled to take the risk of any loss which may be incurred by a sale. The legatees have no right to have the effects marshalled to suit their purposes. A general legatee cannot marshal against a devisee of land, but may against the heir at law. *Herne v. Meyrick*, 1 P. Wms. 201; *Clifton v. Burt*, Id. 678; *Haslewood v. Pope*, 3 P. Wms. 324. So a widow shall have the assets so marshalled as to save her *bona paraphernalia*, or to recompense her, in case they should be taken to pay debts. *Tipping v. Tipping*, 3 P. Wms. 729. In that case Lord Chancellor Macclesfield said, "I take it that *bona paraphernalia* are not devisable by the husband from the wife, any more than heir-looms from the heir; so that the right of the wife to the *bona paraphernalia* is to be preferred to that of a legatee. If the husband, by his will, gives a lease, or a horse, or any specific legacy, and leaves a debt by mortgage or bond in which the heir is bound, the heir shall not compel the specific legatee to part with his legacy in ease of the real estate; but though the creditor may subject this specific legacy to his debt, yet the specific or any other legatee shall, in equity, stand in the place of the bond creditor or mortgagee, and take as much, out of the real assets, as such creditor by bond or mortgage shall have taken from his specific or other legacy. Wherefore, if a legatee shall have this favor in equity, much more shall the wife be privileged with respect to her

Negro Thompson v. Clarke.

bona paraphernalia which are preferred to legacies." The wife's thirds are as much privileged as her paraphernalia. They cannot be devised away from her. She claims paramount to the will. In the case of *Corbet v. Delves*, 3 Atk. 369, Lord Chancellor Hardwicke said, "At law, where the husband dies indebted, the widow cannot have her paraphernalia; but this court does not determine so strictly, for if the personal estate has been exhausted in payment of specialty creditors, she shall stand in their place, as to so much, upon the real assets of the heir at law, for she has a prior right, and a superior one to legatees who take only from the bounty of the testator." *Graham v. Londonderry*, 3 Atk. 395; *Tynt v. Tynt*, 2 P. Wms. 544; *Toler*, 231.

The COURT (*nem. con.*) stopped *Mr. Key* in reply, and refused to instruct the jury that the petitioner was not entitled to freedom under the will.

Verdict for the petitioner, and judgment. Although the title of several other of the slaves depended upon the same will, no writ of error was issued. See the case of *Fenwick v. Chapman*, 9 Pet. 461. accord.

CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1818, AT ALEXANDRIA.

MORGAN *v.* ROWAN.

The by-law of Alexandria requiring the master to pay a poll-tax for his journeymen, is not repugnant to the general law of the land, and is authorized by the charter.

TRESPASS for taking seven pairs of shoes as a distress for not paying a poll-tax due to the corporation for sundry journeymen-shoemakers, employed by the plaintiff.

Upon a special verdict the question was as to the power of the corporation to compel the master to pay a poll-tax for his journeymen. Corp. By-laws, pp. 5, 52, 93, § 3 and 12.

Mr. E. J. Lee, for the plaintiff.

Mr. J. D. Simms, for the defendant.

The COURT (MORSELL, J., *contra*,) was of opinion that the by-law was not contrary to the general law of the land, and was authorized by the charter of the town.

McLAUGHLIN *v.* STEPHENS.

The Common Council of Alexandria, have power to prohibit by their by-laws, the keeping of gaming-tables in the town, under a penalty to be recovered by warrant before the mayor, in the name of the common council, and to be levied upon the goods and chattels of the offender, although he may be also liable to prosecution under the laws of Virginia, adopted by the Act of Congress of the 27th of February, 1801.

TRESPASS against the defendant (who was a constable,) for levying a penalty of \$20, under the by-law of the 15th of June, 1816, for keeping a faro-table.

By the amended charter of 1804, § 5, the Common Council of Alexandria has power to make "all laws which they shall con-

ceive requisite," "for the regulation of the morals and police of the town," and "for the prevention and removal of nuisances," "and to enforce the observance of their said laws by reasonable penalties and forfeitures to be levied upon the goods and chattels of the offender," provided that such laws shall not be inconsistent with the laws and Constitution of the United States.

Mr. Mason, for the plaintiff, contended that the power to make by-laws, was not intended to give the corporation power to make laws concerning matters which were already regulated by the general law of the land; but only concerning such subjects as affected the morals or police of the town exclusively. That the offence was already provided for and prohibited by the Act of Assembly of Virginia of the 19th of January, 1798, p. 373. That gaming did not affect the town exclusively. That the plaintiff might be twice punished for the same offence, if he was liable to this penalty.

Mr. Taylor, contra. This by-law applies exclusively to the police of the town. The penalty is for keeping the gaming-table in the town, which is a circumstance of aggravation of the offence, and is necessary to the conviction.

The COURT (*nem. con.*) was of opinion, that the corporation had power to pass the by-law, and to enforce it in this manner.

JANE H. SLACUM v. AMOS SMITH.

The owner of a slave, may hire him as a mariner to the master of a vessel for a foreign voyage, and may authorize the slave to sign the shipping articles, and the owner will be bound thereby; and the wages will be forfeited by any act of the slave, which would forfeit his wages if he were a free man; but his wages are not forfeited by his quitting the vessel after the voyage is ended, and before the cargo is discharged.

INDEBITATUS ASSUMPSIT, for the hire of a slave.

Mr. Swann, for the plaintiff.

Mr. Taylor, for the defendant.

At the trial, it was contended on the part of the defendant, that the slave had forfeited his wages by his misconduct at Lisbon, and by absenting himself.

The jury found a special verdict, which was submitted to the Court without argument.

The special verdict stated, that the plaintiff hired to the defendant, a negro slave, named David, her property, to serve as a mariner on board the brig Virginia, commanded by the defendant

on a voyage from Alexandria, D. C. to Lisbon, and thence back to a port in the United States; that in pursuance of the said contract, the said slave, with the plaintiff's approbation and consent, subscribed shipping articles for the said voyage, in these words: — [The articles were in the usual form, and are here omitted.] That the plaintiff received from the defendant \$25 for one month's wages in advance. That the brig sailed on the voyage and arrived at Lisbon; and while there the slave was confined nine days in prison, for disorderly conduct, as noted by the proper officer on the brig's log-book. That the brig sailed from Lisbon to New York, where she arrived on the 29th of April, 1813; on which day the said slave absented himself from the said brig, without leave of the master or commanding officer on board, and has not since returned. That entries thereof were made in the log-book on that day, and for three days successively, by the mate having charge of the log-book. That the brig had a cargo which was not discharged at the time of his so absenting himself. That the defendant issued his warrant to apprehend the said slave on the 3d of May, 1813, and that he was apprehended under the said warrant, but again escaped on the same day, and has never returned or been reclaimed. If the law be for the plaintiff, the jury assess the plaintiff's damages at \$86; if the law be for the defendant, they find for the defendant.

CRANCH, C. J. 1. The 1st question is, whether the slave can be considered as a mariner, within the Act of Congress, or the maritime law, so as to forfeit the wages; and whether the plaintiff is bound by the shipping articles?

2. If so, then are the wages forfeited, either by the disorderly conduct at Lisbon, or by the absenting at New York?

1. The plaintiff was competent to make what contract she pleased. By her assent to his signing the articles, and by receiving the month's wages in advance, under those articles, she bound herself that her slave should conduct himself as a seaman, agreeably to the articles, and under the penalty of the articles and the Act of Congress. I am of opinion, therefore, that the wages might be forfeited by the act of the slave.

2. Has there been any act of the slave which would have forfeited his wages if he had been a free man? The jury find that he was confined nine days in prison at Lisbon for disorderly conduct. It does not appear what was his offence; nor whether he was confined at the request of the master, or of the civil authorities of the place. It does not appear to amount to desertion, and if it did, the forfeiture is waived by receiving him again on board.

The absenting himself from the vessel after the voyage was ended, and before the cargo was discharged, is not a forfeiture of

Slacum v. Smith.

wages. See the case of *Swift, Hastings, & others v. Ship Happy Return*, 1 Peter's Ad. Decisions, 253.

I therefore think that judgment should be entered up for the plaintiff.

December 9, 1818. Judgment for plaintiff.

THRUSTON, J., dissenting on the first point, and MORSELL, J., dissenting on the second point.

CIRCUIT COURT OF THE UNITED STATES.

JUNE TERM, 1818, AT WASHINGTON.

BEEDING v. PIC.

Demand of payment of a promissory note on the day after the last day of grace, is too late.

ASSUMPSIT against an indorser of Robert Bayley's note.

H. Wheteroft, the notary-public, demanded payment of Bayley on the day after the third day of grace.

The COURT (*nem. con.*) said the payment should have been demanded of Bayley on the third day of grace, and the protest and notice to the indorsers should be on the day after, and referred to the case of *Lindenberger v. Beale*, at December term, 1813, of this Court. S. C. 6 Wheat. 104.

A juror was withdrawn by consent, and the cause continued. See *Renner v. Bank of Columbia*, 9 Wheat. 582, and *Mills v. Bank of United States*, 11 Wheat, 431, 436, as to the usage of banks in making demand of payment on the 4th day.

UNITED STATES v. MICHAEL CLARKE.

If the jury take out the coroner's inquest and depositions, and find the defendant guilty of murder, a new trial will be granted.

INDICTMENT for murder of defendant's wife.

The jury, when they retired, took out with them the coroner's inquest and depositions, without leave or consent of the prisoner's counsel, and having returned with a verdict, guilty,

The COURT granted a new trial.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1818, AT ALEXANDRIA.

THOMAS L. WASHINGTON *v.* WILLIAM WILSON.

A bill of sale of personal property is valid, between the parties, to transfer the legal title, although the possession and the beneficial interest remain with the vendor.

An action upon the case will lie for the loss of the plaintiff's slave, although the defendant wrongfully and unlawfully acquired and kept possession of the slave.

In an action upon the statute of Virginia, pp. 192, 374, for carrying away the plaintiff's slave, evidence will not be permitted to be given that the slave had hired himself as a free man to another master of a vessel in a previous voyage.

THIS was an action upon the case for the value of a slave of the plaintiff, carried away as a seaman by the defendant, and lost.

The COURT (THRUSTON, J., absent,) instructed the jury in effect, that a bill of sale, under seal, from Sarah Washington to the plaintiff, transferred the legal title to the plaintiff, although the possession and beneficial interest was in Mrs. Washington, and that the plaintiff might recover in his name for her use.

The COURT, also, refused to suffer evidence to be given that the slave hired himself as a free man to another master of a vessel in a previous voyage, the action being given by the Act of Virginia, pp. 192, 374, in the cases described in the act.

The COURT also decided, that the plaintiff could maintain this form of action, (case) although the defendant had wrongfully and unlawfully acquired and kept possession of the slave without the permission or consent of the plaintiff.

Verdict for the plaintiff, \$400 damages; the slave being supposed to be worth \$800.

UNITED STATES *v.* JAMES GODLEY.

An indictment will not lie, at common law, for stealing "a mulatto boy, called William Foote, of the price of 500 dollars, of the property, goods, and chattels of one F. T.," if he is not averred to be a slave.

INDICTMENT at common law for stealing a "mulatto boy, named William Foote, of the price of 500 dollars, of the goods and chattels of one Fanny Thomas."

Mr. Swann and *Mr. Taylor*, for the prisoner, moved the Court

to quash the indictment, and contended that it was no offence at common law to steal a slave, because slavery was not known at common law. It is made an offence, by the Virginia statute, in one case only, namely: when stolen from the possession of the owner or his overseer; and the courts of that State have decided that the possession of a person to whom the slave was hired, is not the possession of the owner or overseer. *Commonwealth v. Williams*, (in 1792,) Virginia Cases, 15; *Commonwealth v. Hayes*, (in 1798,) Virginia Cases, 192. Those courts have also decided that an indictment at common law for stealing a slave cannot be supported.

Mr. N. Herbert and *Mr. Mason*, *contrà*. Slaves in Virginia are goods and chattels, and it is felony at common law to steal goods and chattels, therefore in Virginia, it is felony at common law to steal a slave. Judge Lyon's opinion, 2 Wash. 7. The Virginia statute is cumulative. The decision of the courts of that State are not conclusive upon this Court. *State of North Carolina v. Hall*, Hayward, 105.

The COURT, (*nem. con.*) quashed the indictment, because it did not aver the boy to be a slave.

Mr. Herbert, then moved that the prisoner should be recognized to appear at the next term to answer to a new indictment.

But the COURT, (*nem. con.*) refused; being of opinion that the decisions of the courts of Virginia, that an indictment at common law, for stealing a slave, cannot be supported, are conclusive upon this Court.

WATSON v. HALL.

The common printed form of the deed from an insolvent debtor to his trustee under the insolvent act is sufficiently certain to convey to the trustee a title to slaves.

CASE, for enticing away slaves Harry and Pris.

The plaintiff was trustee of Thomas G. Slye's effects under the insolvent act of the District of Columbia.

Mr. Taylor, for the defendant, objected that the deed was too general, and contained no description of the property sufficiently certain to a common intent. The words are, "all my property real, personal, and mixed, and all my rights, claims, and credits, of what kind or nature soever they may be," "to have and to hold the same to him the said J. W., as trustee as aforesaid, according to the true intent and meaning of the law in such case made and provided, and for no other."

The COURT (CRANCH, C. J., doubting,) decided that the deed was sufficiently certain to pass the title of the slaves to the plaintiff.

NEGRESS SARAH v. ELIJAH TAYLOR.

If a female slave be sold, to serve the vendee for a term of years, with an obligation by the vendee to manumit her at the expiration of the term, and if, during the term she has issue, such issue is entitled to freedom.

THIS was a suit for freedom; and a verdict for the plaintiff was taken subject to the opinion of the Court upon the following facts:

On the 8th of January, 1789, a negro slave called Tamah, was sold by Alexander Smith, her then master, to one Thomas Taylor in the manner and upon the terms and conditions mentioned in a bond given by the said Taylor to the said Smith of the same date, the condition of which bond was as follows: "Whereas the above bound Thomas Taylor hath this day purchased of the said Alexander Smith, one negro woman named Tamah, about five and thirty years old, to serve him the said Thomas Taylor, nine years from the date hereof and no longer. Now the condition of the said obligation is such that if the above bound Thomas Taylor, his heirs, executors, administrators, or assigns, do not carry or suffer to be carried, the aforesaid negro out of the counties of Fairfax, Loudon, Prince William, Fauquier, Berkley, or Frederic, in this Commonwealth during the term aforesaid of her servitude, and, at the end thereof, give her, if she be living, a full and fair discharge from his service, and set free and emancipate the aforesaid negro according to the Act of Assembly in that case made and provided, and now in force in this Commonwealth, then the above obligation to be void, else to remain in full force and virtue in law." It is further agreed that the daughter of the said Tamah was born after the said 8th of January, 1789, and before the expiration of the nine years, which her mother, under the said contract of sale, was bound to serve. It is admitted that the said Tamah has since been duly and legally manumitted in pursuance of the contract aforesaid, and that the plaintiff is now, and was, at the institution of this suit, detained by the defendant claiming her as his slave.

It is agreed that a verdict shall be taken for the plaintiff subject to the opinion of the Court whether she is entitled to her freedom on the above statement.

Mr. Taylor, for the plaintiff. The plaintiff was not the slave of *Mr. Smith*, for he had sold her for nine years and had agreed that she should then be free. She was not the slave of *Taylor*, for he had only a right to her service for nine years. 1 Tuck. Bl. Com. pt. 2, 127, 423.

Mr. Mason, *contrâ*, cited *Pleasants v. Pleasants*, at April term, 1819.

The Court rendered judgment for the plaintiff.

RICHARD H. LOVE v. WASHINGTON BOYD.

In Virginia a person who has been in possession of a slave for five years need not show the deed under which he claims title.

THIS was an action upon the case against the marshal of the District of Columbia, for negligently suffering the plaintiff's female slave Jane to escape from his custody to which the slave, who had sued for her freedom had been committed for safe keeping by order of this Court, the owner having failed to give security to have her forthcoming to answer the judgment of the Court, according to the provisions of the Act of Virginia.

Mr. Swann, for the plaintiff, offered parol evidence that the plaintiff held possession of the slave for more than five years under a deed of trust.

Mr. Taylor, for the defendant, objected to the parol evidence, and contended that the deed must be produced, and that no possession under the deed can be proved until the deed is produced; and the Court (*THRUSTON, J.*, absent,) inclined to that opinion; but said that the point might be saved; whereupon the parties agreed that the parol evidence offered by *Mr. Swann*, should be submitted to the jury; and that if the verdict should be for the plaintiff, and the Court should be of opinion that the evidence was not competent, the verdict should be set aside and a *nonsuit* entered. Verdict, for the plaintiff, \$250.

On a subsequent day the Court rendered judgment for the plaintiff on the verdict, being of opinion that five years possession was sufficient evidence of title without showing the deed under which the plaintiff claimed.

NEGRESS BETTY v. JAMES C. DENEALE.

A deed of manumission when acknowledged and recorded, relates to the time of its execution.

The Court (*THRUSTON, J.*, absent,) decided that the deed of manumission, in this case, when it was acknowledged and recorded according to law, related back to the time of its execution.

United States v. Anderson.

RICKETTS *et al.* v. HENDERSON.

A judgment against the principal debtor, in a foreign attachment in Pennsylvania, is not evidence, in the District of Columbia, of a debt due by that debtor.

DEBT, on a judgment in Pennsylvania on a foreign attachment.

Mr. Taylor, for the defendant, contended that as the judgment was rendered without any personal notice to the defendant, it was not even *prima facie* evidence of a debt. *Robinson v. Ward*, 8 Johns. 89; *Kilburn v. Woodworth*, 5 Johns. 37; and *Buchanan's case*, 9 East.

The Court, having taken time to consider, rendered judgment for the defendant, on the authority of the cases cited by the defendant's counsel.

Mr. Swann, for the plaintiff.

UNITED STATES v. JAMES ANDERSON.

A prisoner in execution for debt, at the suit of the United States, is entitled to the benefit of the prison bounds, upon giving sufficient security.

THE defendant was brought in by the marshal at the suit of the United States, upon a *ca. sa.* for debt; and applied for the benefit of the prison bounds, and tendered a bond with sufficient sureties.

THE COURT (THRUSTON, J. doubting,) decided that he was entitled to the benefit of the bounds. See the Acts of Congress, of 6th January, 1800, § 1, [2 Stat. at Large, 4,] for the relief of persons imprisoned for debt; and 3d March, 1803, §§ 16 and 17, [2 Stat. at Large, 241,] for the relief of insolvent debtors, within the District of Columbia.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1818, AT WASHINGTON.

UNITED STATES *v.* MICHAEL CLARKE.

A prisoner should not be found guilty, if, at the time of committing the act, he was in such a state of mental insanity, not produced by the immediate effects of intoxicating drink, as not to have been conscious of the moral turpitude of the act.

THE prisoner was indicted for the murder of his wife by shooting her with a musket upon her return home in the evening from church.

Mr. Key, for the prisoner, prayed the Court to instruct the jury that if they should be satisfied, by the evidence, that the prisoner, from long and settled habits of intemperance, had become disordered, both in body and mind, and subject to fits which affected both his mind and body, and that, by reason thereof, he was generally, and at all times, when not under the influence of liquor, of unsound mind, then the prisoner cannot be found guilty of killing the deceased with malice.

Which instruction the COURT (*nem. con.*) refused to give, but instructed the jury, that if they should be satisfied, by the evidence, that the prisoner at the time of committing the act charged in the indictment, was in such a state of mental insanity, not produced by the immediate effects of intoxicating drink, as not to have been conscious of the moral turpitude of the act, they should find him not guilty.

Verdict, guilty. Sentence of death.

MATTINGLY *v.* SMITH.

THE Court will not, on motion, quash a *ca. sa.* issued by the clerk of this Court upon a judgment of a justice of the peace, upon the ground that the defendant had applied for the benefit of the insolvent laws of Maryland, and had obtained an order, and given bond, for his appearance in St. Mary's county, Maryland, but had not yet obtained his final discharge.

THE defendant moved the Court to quash a *ca. sa.* issued by the clerk of this Court upon the judgment of a justice of the

United States v. Read.

peace, because he had applied for the benefit of the insolvent laws of Maryland, where he resided, and had obtained an order, and given bond for his appearance in St. Mary's county, by which he is protected from arrest in Maryland, but had not yet obtained his final discharge.

The COURT overruled the motion, and refused to quash the *ca. sa.*

NEGRO SAMUEL BIAS v. JOHN ROSE.

A slave brought into the county of Washington from Maryland, by his owner, and within three years thereafter mortgaged for his full value, does not thereby acquire a right to his freedom.

THIS was a petition for freedom, submitted to the Court by *Mr. Key*, for the petitioner, and *Mr. Jones*, for the defendant, upon a case in which it was stated that the petitioner was brought into this county from Maryland, by one Richards, his owner, and within three years thereafter was mortgaged by Richards to W. Bowie, who assigned the mortgage to the defendant, who holds the petitioner under the mortgage. That Richards became insolvent, and was discharged under the insolvent act of the District of Columbia.

The petitioner claims his freedom under the Act of Maryland, of 1796, c. 67, §§ 1, 2, and 3. The first section is general, and prohibits the importation of slaves to reside, or for sale, and declares that if so imported they shall be free. The second section excepts slaves brought in by citizens of the United States, coming with a *bonâ fide* intention of settling in the State; but the third section says that nothing in the act contained shall be construed to enable any person, so removing, to sell or dispose of any slave so imported, unless such person shall have resided within the State three whole years next preceding such sale.

The COURT (THRUSTON, J., not sitting,) was of opinion that the law was against the petitioner, and rendered judgment for the defendant.

UNITED STATES v. BETTY READ.

The Court will not order stolen bank-notes to be restored to the person from whom they were stolen, they having been received *bonâ fide* by innocent persons in the way of business.

INDICTMENT for stealing bank-notes, the property of Mr. Nottingham. Some of the notes, which were identified, had been

McDaniel v. Fish.

passed to sundry persons who received them innocently and *bonâ fide* in the way of business. Verdict, guilty.

The COURT (THRUSTON, J., absent,) refused to order such notes to be given up to Mr. Nottingham.

TRAVERS v. BELL *et al.*

If the magistrate who takes a deposition under the Act of Congress, omits to state whether notice was given to the defendants, it is competent for the party who offers it in evidence to prove that the other party lived more than 100 miles from the place of caption and had no agent or attorney within 100 miles, &c.

THE plaintiff offered to read in evidence, at the trial, a deposition taken under the Act of Congress.

Mr. Jones, for the defendant, objected that the judge who took the deposition had not stated whether any notice had been given to the defendants, although he had stated that the place of caption was more than 100 miles from the place of trial.

THE COURT (THRUSTON, J., absent,) overruled the objection and said that the plaintiff might prove that the defendants lived more than 100 miles from the place of caption and had no agent or attorney within 100 miles, &c.

GEORGE JOHNSON v. ISAAC OWENS.

A distress for rent, laid on the last day of the term, at noon, is too soon.

REPLEVIN. Distress for rent, laid on the last day of the term, at noon.

Mr. Key, for the defendant, contended, that although the original taking might be unlawful, yet that the distress must be considered as made on the next day, when the goods were appraised; but

The COURT (*nem. con.*) said it was to be considered as one act; the distress was in fact made on the 19th, the last day of the term, which was too soon.

McDANIEL, for the use of James Semmes, v. FRANCIS FISH *et al.*

The Court will not, at a subsequent term, reinstate an action of replevin which had been *non-pressed* at a preceding term, upon a rule to declare.

In an action upon a replevin-bond, it seems that the defendant may, in mitigation of

Holmead v. Maddox.

damages, give evidence of fraud, by which the defendant was cheated by the plaintiff and others, in playing at cards, whereby the plaintiff won the mare of the defendant, which was the subject of the replevin.

DEBT on replevin bond. The breach assigned was, that the plaintiff, in replevin, did not prosecute the replevin to effect.

Mr. Jones, for the defendants in the present action, moved the Court for leave to reinstate the replevin, and bring it forward on the docket, it having been *non-prossed* at December term, 1816, on the imparlance docket, upon a rule to declare; on the ground that the plaintiff in replevin, was an ignorant man and did not know that he was to appear in Court to prosecute his suit, and did not employ an attorney. The motion was supported by the affidavits of Fish himself, and several witnesses tending to show a gross cheating of Fish, by James Birch, — Burgerson, and James Semmes, in playing at cards and winning Fish's mare, which was the subject of the replevin.

Fish had never entered his appearance in the replevin, either in proper person or by attorney. At the return term of the writ, the defendant appeared and laid a rule on the plaintiff to declare by the rule-day; upon which rule the replevin was *non-prossed* at the subsequent term. No judgment was ever entered for a return.

The COURT (*nem. con.*) refused to reinstate the cause, on account of the wide door it would open to motions of this kind; and because the merits of the case might be given in evidence in mitigation of the damages, in the present action upon the replevin-bond.

JOHN HOLMEAD v. JOHN MADDUX.

The owner of a race-field, who knowingly lets it for the purpose of public races, and for booths and stands for the accommodation of licentious and disorderly persons for the purposes of unlawful gambling and of gross immorality and debauchery, to the corruption of morals and manners, cannot recover the rent in an action of covenant.

COVENANT for non-payment of \$400, being the balance due for a year's rent of a race-field, upon an agreement under seal, dated January 17, 1817, at \$700 a year, for five years. In the agreement it is called "The Washington City Race-field," and included "stables and sheds for the purpose of training race-horses in, for the spring and fall races, and also for match races."

Mr. Jones, for the defendant, prayed the Court to instruct the jury, that if they "should find, from the evidence, that before the execution of the lease, the said race-course, when used as such, was a notorious resort for large assemblages of licentious and

 Contee v. Garner.

disorderly persons for the purposes of unlawful gambling and of gross immorality and debauchery ;” and that the plaintiff, at the time of making the said lease, knew that such practices were the ordinary concomitants of a race-course, when used as such, and especially of the race-course in question, and had reasonable ground to believe that the defendant intended to rent out booths and stands thereupon, to which such licentious, disorderly, and gambling persons would naturally resort, and for their accommodation ; and that the said race-course, long before the said demise, and ever since, when used as a race-course, has been an offence and scandal to all moral and sober persons, and notoriously tended to the corruption of morals and manners, and that the plaintiff had reasonable ground to conclude that it would be so continued, and that, in fact, it has so continued under the said lease, then he is not entitled to recover in this action.

Mr. Key, contra, contended that racing, in itself, is not unlawful, and that the defendant might have prevented all the evils attending it, and prevented it from becoming a nuisance. It was his own fault, not the plaintiff's.

But the COURT (THRUSTON, J., absent,) gave the instruction prayed by *Mr. Jones*.

Verdict for the defendant.

CONTEE v. GARNER.

A special plea of *non est factum* must conclude with a verification.

A slave cannot bind himself, at law, to pay money to his master, even for his freedom.

THE defendant pleaded, that at the time of signing the bond he was a slave, and so *non est factum*, and concluded to the country. Special demurrer, because he did not conclude with a verification.

Mr. Law, in support of the demurrer, cited *Whelpdale's case*, 5 Co. 119; 1 Chitty on Pleading, 537; *Bushell v. Pasmore*, 6 Mod. 218; and Story, 189.

Mr. Jones, for the defendant, submitted the question without argument.

The COURT (THRUSTON, J., absent,) was inclined to think that it ought to have concluded with a verification.

The COURT also decided that a slave cannot bind himself, at law, to pay money to his master, even for his freedom.

By consent, the plea was amended, the demurrer withdrawn, and issue joined upon the replication to the plea. Upon the trial, the plaintiff was *non-prossed*.

CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1819, AT ALEXANDRIA.

UNITED STATES *v.* THOMAS GEE.

Upon an indictment for larceny, in Alexandria, D. C., the prisoner is entitled to a peremptory challenge.

INDICTMENT for stealing the money of James H. Caldwell.

The COURT decided that the prisoner was entitled to a peremptory challenge. Law of Virginia, 13th November, 1792, § 8, p. 103.

OWEN CONNER *v.* SEPTIMUS LEVERING.

If goods are lost from the ship, by the negligence of the mate, he cannot recover his wages; but he is not liable for a mere mistake in returning to the master a bale more than was actually received.

ASSUMPSIT, by the mate of the ship, for his wages. Defence, that a bale of goods was lost.

Mr. Swann, for the plaintiff, *Mr. Taylor*, for the defendant.

The COURT instructed the jury, that if they should be satisfied, by the evidence, that the bale of goods was delivered to the plaintiff, or put on board of the vessel, and was lost by the negligence or fraud of the plaintiff, he could not recover in this suit; the value of the goods being more than the amount of his wages.

The COURT refused to instruct the jury that the plaintiff was liable for a mere mistake in returning to the master a bale more than was actually received. See *Crammer et al. v. Ship Fair American*, 1 Peters, Adm. Decisions, 243, and *Lewis v. Davis*, 3 Johns. 18.

CRANCH, C. J., gave no opinion upon the last point.

UNITED STATES v. GEORGE WOOD.

A defendant indicted for counterfeiting a bank-note in Alexandria, D. C., is entitled to a peremptory challenge, it being felony without benefit of clergy, by the Virginia acts of December 19th, 1792, and December 8th, 1794.

Falsely altering a promissory note in a material part, with intent to defraud any person, is a forging within the meaning of the statutes.

INDICTMENT for counterfeiting a note of the Mechanics Bank of Alexandria.

Mr. Mason, for the defendant, contended that the statutes of December 19, 1792, and December 8, 1794, do not punish the altering of a note; that altering is not forging, or counterfeiting, or making. The note had been originally a note of the Merchants Bank, which had failed, and was altered so as to purport to be a note of the Mechanics Bank, which was in good credit.

The COURT (THRUSTON, J., absent,) on the prayer of *Mr. Jones*, for the United States, instructed the jury that the falsely altering of the note in a material part, with intent to defraud any person, was a forging within the meaning of the statutes.

Verdict, not guilty.

HENRY NICHOLSON v. JAMES and ROBERT PATTON.

In an action against James and Robert, charging them as partners, and, as such, liable for bills drawn by James in his own name, but for the benefit of the partnership, James cannot be examined as a witness for Robert, upon an issue joined by Robert alone, although judgment should have been rendered against James by default.

The want of notice of non-acceptance is not excused by an understanding between the plaintiff and James, that the bill should not be sent on for acceptance.

If the declaration aver a protest for non-acceptance, as well as for non-payment of a foreign bill, and the action be brought upon the protest for non-payment, it is not necessary that the plaintiff should prove the averment of protest for non-acceptance.

In order to charge Robert upon a bill drawn by James in his own name, it is necessary to prove that James and Robert carried on business in partnership under the firm of James. *Prima facie* it is the sole bill of James.

Action by the payee against James and Robert Patton, as drawers of a foreign bill of exchange, drawn in the name of James alone, and protested for non-payment.

Mr. Taylor and *Mr. Swann*, for the defendant Robert, offered to examine the defendant James as a witness for Robert, upon the issue joined for him, judgment having been rendered against James by default, and the same jury having been sworn to assess the damages as to James at the same time.

Mr. E. J. Lee and *Mr. Jones*, *contrà*. The general rule is,

Negro Sam v. Green.

that a party cannot be a witness. The exceptions are only in cases where the judgment may be several; but here it must be joint; although the defendant, James, should confess judgment.

The COURT (*nem. con.*) rejected the witness as incompetent.

The COURT also, at the prayer of the defendant's (Robert's) counsel, instructed the jury that want of notice of non-acceptance, is not excused by an understanding between the plaintiff and the defendant James, that the bill should be sent on for acceptance.

The declaration averred a protest for non-acceptance as well as for non-payment. By the Virginia statute of November 12th, 1792, § 2, the plaintiff would be entitled to recover interest from the date of the protest for non-acceptance.

Mr. Taylor, for the defendant, Robert, contended that the averment of protest for non-acceptance was material, and therefore ought to be proved, notwithstanding the decision of the Supreme Court of the United States in *Brown v. Barry*, 3 Dal. 365.

But the COURT (CRANCH, C. J., *contrà*,) said it was not necessary that the plaintiff should prove that averment.

The COURT, (THRUSTON, J., absent,) at the prayer of the counsel for the defendant, Robert, instructed the jury that in order to charge the defendant, Robert, in this action, it is incumbent on the plaintiff to prove that James and Robert carried on business under the name and firm of James Patton; and that this bill, on its face, purports to be the sole bill of James.

NEGRO SAM v. JAMES GREEN.

A slave does not acquire freedom by an importation and continuance a year in Alexandria, unless he continue there one year under the same master or owner.

THE COURT (THRUSTON, J., absent,) at the prayer of the defendant's counsel, instructed the jury that the plaintiff did not acquire a right to freedom by being brought into Alexandria, and continuing there one year, unless he was continued there a year by one and the same master. For the loss of the property in the slave was in the nature of a penalty; that no freedom can be acquired under the second section of the act, but in a case in which the penalty of \$200 also is incurred, under the third section of the act of 17th of December, 1792.

Mr. Taylor, for the plaintiff.

Mr. Hewitt and Mr. Stone, for the defendant.

United States *v.* Blacklock.

NEWTON KEENE *v.* J. W. JACKSON.

An attachment for rent not due, is superseded by the tenant's discharge under the insolvent law of the District of Columbia of the 3d of March, 1803, § 5.

THIS was an attachment for rent not due, under the Virginia Act of 29th November, 1792, § 8, p. 154.

Mr. Swann, for the plaintiff, moved for judgment on the attachment. Since the attachment was served, and before the rent became due, the tenant, Jackson, was discharged under the Insolvent Law of the District of Columbia of 3d March, 1803.

Mr. Mason, for the trustee of Jackson's effects, objected that the attachment was superseded by the discharge of the tenant under the Insolvent Act, § 5.

And the COURT (THRUSTON, J., absent,) being of that opinion, quashed the attachment.

UNITED STATES *v.* BLACKLOCK.

The right of the United States to summary judgment, under the Act of Congress of the 3d of March, 1797, c. 74, § 3, "to provide more effectually for the settlement of accounts between the United States and receivers of public money," does not extend to suits brought by the United States as indorsees of promissory notes.

ASSUMPSIT by the United States against the defendant as indorser of a promissory note.

Mr. Jones, for the United States, claimed a summary judgment, at the return term, upon motion, according to the 3d section of the Act of Congress of the 3d of March, 1797, [1 Stat. at Large, 512,] "to provide more effectually for the settlement of accounts between the United States and receivers of public money.

Mr. Taylor, for the defendant, objected, that the act relates only to such receivers of public money as are accountable agents, such as have been intrusted with public money to account therefor; whose accounts are to be adjusted at the treasury of the United States; who may be entitled to commissions, and whose commissions may be forfeited. The third section refers only to such receivers of public money as are designated by the first section.

And the COURT (THRUSTON, J., absent,) being of that opinion, overruled the motion.

 Irwin v. Henderson and Sanderson.

BOWIE AND KURTZ v. WHEELRIGHT.

In a charter-party, the words "charter and to freight let," do not imply a covenant, in law, that the vessel is, or shall be seaworthy.

COVENANT, on a charter-party. Breach, that the vessel was not seaworthy. General demurrer and joinder. The charter-party, upon oyer did not appear to contain any express covenant of seaworthiness.

Mr. Taylor, for the defendant, contended that the defendant could not be made liable, unless there was an express warranty, or fraud, or misrepresentation.

Mr. Swann, for the plaintiffs, contended that a covenant is implied in the act of hiring the vessel.

The COURT (THRUSTON, J., absent,) decided that the charter-party, not containing an express averment that the vessel was seaworthy, could not support the averment of such a covenant in the declaration.

 AULD *et al.* v. MANDEVILLE.

Notice to the indorser on the third day of grace, although after bank hours, is too soon.

ASSUMPSIT, against the indorser of Griffith's note. Demand of payment from the maker was made before three o'clock on the last day of grace, and payment being refused, the notary gave notice to, and demanded payment from, the defendant after three o'clock of the same day.

The COURT, upon the authority of the cases decided in Washington, viz.: *Lindenberger v. Beale*, at December term, 1813, and *Beeding v. Pic*, at June term, 1818, [*ante*, 152,] rendered judgment for the defendant upon the case stated and referred to in the verdict of the jury.

 THOMAS IRWIN v. ALEXANDER HENDERSON and JAMES SANDERSON.

The Act of Limitations of Virginia of the 19th of December, 1792, p. 107. is not a bar to a judgment, if execution has been issued thereon, and returned within ten years after the date of the judgment.

If the plaintiff demurs to the defendant's plea to a chancery attachment, he thereby

Irwin v Henderson and Sanderson.

waives his right to move to strike out the plea, on the ground that it was pleaded without giving special bail.

THIS was a chancery attachment, to recover the amount of a judgment at law obtained by the plaintiff against the defendant in the year 1805, for \$901.83, with interest from the 26th of May, 1801 and costs. The present suit was commenced on the 20th of November, 1816. The defendant, Henderson, was discharged under the insolvent act in 1806. The bill states that he had since acquired property sufficient to pay the debt, which was in the hands of the defendant, Sanderson.

The defendant, Henderson, appeared under the rule of this Court, without discharging the attached effects, and pleaded that the judgment was rendered in 1805, more than ten years before the commencement of this suit; that in January, 1806, the plaintiff issued a *ca. sa.* which the marshal returned "countermanded." That, on the 8th of February, 1813, the plaintiff sued out a *fi. fa.* upon the judgment, which was returned "no effects," and that the defendant did not at any time within ten years before the commencement of this suit ever promise or agree to come to any account for, or to pay, or in any way satisfy the complainant any money or other thing for, or on account of, the said judgment, or any other debt or demand.

To this plea, there was a general demurrer and joinder.

Mr. Jones, for the plaintiff, moved the Court to strike out the plea, because the defendant had not given the security required to dissolve the attachment, contending that the rule of Court only allowed the defendant to appear and answer, but not to plead, without dissolving the attachment.

The COURT, however, (THRUSTON, J., absent,) was of opinion, that by demurring to the plea, the plaintiff had waived his right to move to strike out the plea for that cause; but gave no opinion whether it would have been good cause for striking out the plea if the motion had been made before the demurrer.

The COURT gave judgment for the plaintiff upon the demurrer, being of opinion that where an execution has been returned, there is no limitation to the revival of the judgment.

CIRCUIT COURT OF THE UNITED STATES.

JUNE TERM, 1819, AT WASHINGTON.

WAGNER *v.* WATTS.

In a suit between contending mortgagees, the mortgagor is a competent witness for the first mortgagee, to identify the goods described in the first mortgage.

A mortgage of "the whole of my stock of books and stationery now remaining in my possession, and also such additions thereto as I may hereafter make from time to time to the same," is not void for uncertainty, but conveys only the stock on hand at the date of the mortgage.

ASSUMPSIT for \$3000, money had and received by the defendant to the plaintiff's use, being the proceeds of the sale of the stock of books and stationery of Mr. Richards, a bookseller in Georgetown, under a mortgage made by him to the defendant, dated 3d of May, 1817, and upon which the plaintiff claimed to have a prior mortgage, dated 1st of February, 1817. The property conveyed by the mortgage to the plaintiff was thus described: "The whole of my stock of books and stationery now remaining in my possession, and also such additions thereto as I may hereafter make from time to time to the same." And the mortgage provided, that, whereas the plaintiff had indorsed and thereafter might indorse various promissory notes of Richards, the plaintiff might from time to time sell at public sale, such part of the said stock of books and stationery as should be necessary to take up any of the said notes which Richards should fail to pay when due. This mortgage was duly acknowledged and recorded agreeably to the Act of Maryland respecting secret sales. The subsequent mortgage to the defendant, by Richards, was of all his books and stationery, and stock in trade, &c., and provided that Richards should retain the possession, and carry on the trade until default should be made by Richards in not paying certain notes which the defendant also had indorsed for him, with power to the defendant to take possession of the whole and proceed to sell, &c. This mortgage was also duly acknowledged and

recorded. Under this power, the defendant seized the goods and sold them, to the amount of \$4731.62; of which sum \$1101 were paid over to the plaintiff. The stock thus sold consisted, in part, of the original stock at the date of the first mortgage, and in part of other books and stationery purchased with the proceeds of the original stock, or exchanged for the same.

This action was brought to recover the residue of the proceeds of sale of the whole stock. All the notes indorsed by the plaintiff previous to the 10th of April, 1817, had been paid; and on that day the plaintiff indorsed a new note for Richards for \$1550, and on the 16th of April, 1817, another for \$1600, and on the 1st of May, 1817, another for \$450, all of which were discounted at some of the banks, and \$800 of the proceeds were applied to the use of the plaintiff, and the notes themselves were still lying over unpaid and dishonored, and the plaintiff held accountable therefor. Richards continued in possession of the books and stationery from the date of the first mortgage, and continued to exercise acts of ownership over them, carrying on the business in a retail shop, selling and exchanging in the usual course of business, until the defendant took possession of the shop and goods. Richards, while in possession, was in the habit of buying other books and stationery with the proceeds of sale of the original stock, so that it was uncertain what portion of the original articles remained when the defendant took possession on the 10th of June, 1817.

Upon the trial, the plaintiff offered to examine Mr. Richards, as a witness, to identify the goods which were part of the original stock on hand at the date of the first mortgage.

Mr. Swann and *Mr. Taney*, for the defendant, objected that he was interested.

But the COURT (MORSELL, J., not sitting,) not perceiving his interest, overruled the objection, and the defendant took a bill of exceptions.

The defendant's counsel then prayed the Court to instruct the jury that the mortgage to the plaintiff was void upon the face of it, for uncertainty, both as to the debts intended to be secured, and the property intended to be conveyed by it: and cited 4 Com. Dig. 296, tit. Grant, D., and 3 Bac. Ab. 382, 384.

Mr. Jones, contra, cited *Hodgson v. Butts*, 3 Cranch, 140.

The Court refused to give the instruction.

The counsel for the defendant then moved the Court to instruct the jury that, upon the evidence, the plaintiff had no right to recover any money for the books and stationery thus sold by the defendant, unless they were the property of Richards at the date of the first mortgage.

Riggs v. Stewart.

Mr. Swann and *Mr. Taney*, for the defendant, cited 3 Bac. Ab. 307, Gwillim's Ed., note from Cowper, 434; *Ryall v. Rolle*, 1 Wilson, 261; 1 Bac. Ab. 467; *Yelverton v. Yelverton*, Cr. Eliz. 402.

Mr. Jones and *Mr. Key*, for the plaintiff, cited *Hoove v. United States*, 1 Cranch, 318; Com. Dig., Grant, C., p. 295; Powell on Contracts, 156; Shep. Touch. 241.

The COURT gave the instruction as prayed, and further instructed the jury, that the plaintiff could not recover for any part of the stock of goods which was acquired by Richards subsequently to the date of the first mortgage, whether such additions to the original stock of goods consisted of goods bought with the proceeds of the sales of the said original stock, or of goods exchanged for the same as aforesaid.

The plaintiff took a bill of exceptions, but no writ of error.

Verdict for defendant.

But see 2 Eq. Ca. Ab. 479, 480, and *Bucknal et al. v. Roiston*, Prec. in Chan. 285.

ELISHA RIGGS v. WILLIAM STEWART.

If one of three joint defendants pay the whole debt upon a joint execution for a debt contracted by them jointly, in a transaction in which they were partners, he cannot, at law, recover from the other partners their respective proportions of the whole debt which he has thus paid.

ASSUMPSIT for money paid by the plaintiff for the use of the defendant.

The plaintiff and defendant, and C. J. Nourse had made a joint purchase of salt, upon which a joint judgment had been recovered against them by one Lindsay. (See the case of *Riggs v. Lindsay*, in the Supreme Court, U. S., 7 Cranch, 500.) Upon a joint *ca. sa.* upon that judgment, the plaintiff Riggs was taken, and paid the whole amount of the judgment, and brought this action against the defendant Stewart, for his proportion of that amount.

The defendant, having given evidence to the jury to show that the judgment was upon a joint transaction in which all the defendants were interested as partners, prayed the Court to instruct the jury, that if they should be of opinion, from the evidence, that the claim which the plaintiff seeks to recover in this action, arose out of a transaction in which the plaintiff and defendant were, with others, concerned as partners, then this action at law cannot be sustained against the defendant.

Weightman v. Queen.

Mr. Swann and *Mr. Taney*, for the defendant, cited *Chitty* on Pleadings, 21; *Williamson v. Frazier*, 4 Esp. Rep. 182; *Smith v. Barrow*, 2 T. R. 476; *Hesketh v. Blanchard*, 4 East, 144; *Ozeas v. Johnson*, 1 Binney, 191; 1 Com. on Contracts, 294, 295, 296; *Wright v. Hunter*, 1 East, 20; *Merryweather v. Nixan*, 8 T. R. 186.

Mr. Marbury, *Mr. Law*, and *Mr. Jones*, for the plaintiff, cited *Watson* on Part. 405; *Merryweather v. Nixan*, 8 T. R. 186; 1 Com. on Cont. 327; *Wright v. Hunter*, 1 East, 20; 2 Com. on Cont. 186; *Van Ness v. Forrest*, 8 Cranch, 30; *Foster v. Allenson*, 2 T. R. 479; Com. on Cont. 329; *Osborne v. Harper*, 5 East, 225; *Petrie v. Hannay*, 3 T. R. 418; *Aubert v. Maze*, 2 B. & P. 371; *Yeakney v. Reynow*, 4 Burr. 2069; *Mitchell v. Cockburne*, 2 H. Bl. 379.

The COURT (MORSELL, J., not sitting,) gave the instruction as prayed, and the plaintiff took a bill of exceptions, but never prosecuted a writ of error.

GOOD v. SPRIGG.

An indorser, who has been discharged by the laches of the plaintiff, is not bound by a promise to pay, unless he knew, at the time of his promise, the fact of laches.

ASSUMPSIT against the indorser.

Mr. Jones, for the defendant, contended that the defendant was not bound by his promise to pay, not knowing that demand of payment had not been made of the maker, and that it was incumbent on the plaintiff to show that the promise was made by the defendant with a knowledge of that fact.

And so the COURT decided. CRANCH, C. J., doubting whether the burden of proof, as to that fact, was not on the defendant.

JOHN WEIGHTMAN v. QUEEN.

After the assignment of a claim upon an open account, the debtor cannot, in an action brought for the use of the assignee, set off a claim against the assignor, arising after notice of the assignment.

This suit was brought in the name of John Weightman, for the use of Henry Weightman, upon an open account assigned to the latter. The defendant offered to set off a claim against John Weightman, arising since the defendant had notice of the assignment.

Hawkins v. Cox and Smith.

The COURT decided that the defendant could not set off claims accruing after the notice.

Mr. Lear, for the plaintiff, *Mr. Jones*, for the defendant.

HAWKINS v. COX AND SMITH.

The plaintiff cannot maintain an action upon a note given for the purchase of a ticket in a lottery prohibited by law.

A lottery for the sale of lots or lands, is within the prohibition of the Maryland Act of 1792, ch. 58.

ASSUMPSIT upon a note given for the purchase of a ticket in a lottery, the prizes in which consisted of lands and lots.

Mr. Jones and *Mr. Wallach*, for the defendant.

The note was given for an illegal consideration, namely, a ticket in a lottery prohibited by the Act of Maryland of 1792, c. 58, the first section of which makes it unlawful for any person within the State, without the permission of the Legislature, to propose to the public any scheme of a lottery to be drawn within the State, or of a lottery for the disposal of any kind of property within the State, under the penalty of £500. And by the second section, if any person shall sell, or offer to sell, within the State, any ticket in any lottery, not authorized by the Legislature of the State, he shall forfeit £10 for every ticket so sold, or offered for sale. This act was adopted as the law of this part of the District of Columbia, by the Act of Congress of the 27th of February, 1801.

Mr. Law, *contra*, contended,

1. That this was not such a lottery as was contemplated by the first section of the act.

2. That the second section of the act does not prohibit the sale of tickets in any lottery not prohibited by the first section.

3. It does not make void the contract or the note.

4. The statute is not applicable to this district. A lottery now authorized by the Legislature of Maryland would not be a lawful lottery here. Nor would a lottery now prohibited by the Legislature of Maryland, be, for that reason, an unlawful lottery here.

The COURT (*nem. con.*) was of opinion that the lottery was within the Maryland statute of 1792, c. 58, which was adopted by the Act of Congress of the 27th of February, 1801, with the other laws of Maryland, and that the consideration of the note being unlawful, the plaintiff was not entitled to recover.

Judgment for the defendants, on the case stated.

THE UNITED STATES, at the relation of the Treasurer of County of Washington, v. THE CORPORATION OF WASHINGTON.

A writ of mandamus is the proper process to compel the corporation of Washington to pay to the county treasurer one half of the expense of erecting a bridge over Rock Creek, according to the 11th section of the Act of Congress of the 1st of July, 1812.

The Levy Court is authorized by the act, to ascertain, conclusively, the sum required for the rebuilding of the bridge.

THE treasurer of Washington county, by his petition, prayed the Court to issue a writ of *mandamus* to compel the Mayor, Aldermen, and Common Council of the city of Washington to pay over to the Treasurer of the county of Washington, one half of the expense of rebuilding a bridge over Rock Creek.

By the Act of Congress of the 1st of July, 1812, § 12, [2 Stat. at Large, 773,] it is enacted, "That the two bridges over Rock Creek, immediately between the city of Washington and Georgetown, shall be kept in repair, and rebuilt in like manner as at present, at the joint expense and cost of the said city and Georgetown; and the sums required for such repairs or rebuildings shall, from time to time, be ascertained by the said board of commissioners or Levy Court, for the county; and the amount required from each corporation shall be paid over, after sixty days' notice, to the treasurer of the county."

The Levy Court had ascertained the sum required for the rebuilding of the bridge, and given notice to the corporation of Washington.

THIS COURT, thereupon, granted a rule on the corporation, to show cause why a writ of *mandamus* should not issue to compel them to pay one half of the amount thus ascertained.

The corporation of Washington appeared by Mr. Law and Mr. Caldwell, and contended that the rule should not be made absolute:

1. Because a *mandamus* is not the proper remedy in this case for the recovery of whatever claim the Levy Court might have, but that they ought to proceed by action at law.

2. That the Court had no power to issue the writ of *mandamus*, because it was not necessary to the exercise of its jurisdiction. *McIntire v. Wood*, 7 Cranch, 504.

3. That the bridge was not rebuilt in like manner as it originally stood, was much enlarged, and built in a much more expensive manner.

THE COURT (*nem. con.*) declined hearing the counsel on the other side, upon the question whether the writ of *mandamus* was the proper remedy, being clearly of opinion that it was; and that the Levy Court had authority under the Act of Congress to

Levy Court v. The City of Washington.

ascertain the cost; and requested the counsel for the *mandamus* to show that the proceedings of the Levy Court were conformable to the Act of Congress.

The Court, said that if the case was ready for a peremptory *mandamus* (it being understood that the counsel on both sides had agreed that the case should now be considered as if it were heard upon a return of a *mandamus nisi*) a peremptory *mandamus* should issue.

The matter was afterwards settled between the parties.

(I cannot find that this case was ever entered upon the records or the minutes of the Court; the petition for the *mandamus*, the answer to the rule to show cause, and a note of the opinion of the Court, are among the papers in No. 45, Petition Docket of June, 1819.)

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THE LEVY COURT OF WASHINGTON COUNTY v. THE CORPORATION
OF THE CITY OF WASHINGTON.

The following are items of general county expenses and charges to be borne and defrayed by the city of Washington and the other parts of the county equally, viz.: The charge for the attendance of the members of the Levy Court; the rent of rooms; salary of the clerk; removing records; advertising notices of the times of meeting; summoning a member to attend; expense of assessment; commission for collecting county taxes.

This was an application, made to this Court, on behalf of the Levy Court of the county of Washington, stating that a difference of opinion existed between the corporation of Washington and the Levy Court upon the question whether certain items charged by the Levy Court, in their account against the corporation of Washington, were, or might be properly called general expenses, and applicable to the whole county, and praying this Court, under the authority of the Act of Congress of the 1st of July, 1812, § 11, [2 Stat. at Large, 773,] “to inquire, determine, and settle, in a summary way, the matter in difference.” The disputed items were:

For the attendance of the members of the Levy Court,	\$362.00
“ the use of Davis & Crawford’s rooms,	58.00
“ Salary of the clerk of the Levy Court at \$250 per annum,	958.33
“ Removing the records in 1814,	19.00
“ Advertising,	21.75
“ Express to William M’Murray,	2.50
“ Discounts,	92.40
“ Expense of assessment,	490.00
“ Commissions on collection of taxes,	1267.64

Okely v. Boyd.

It was admitted by the parties, that the amount charged for the attendance of the members of the Levy Court, was the amount to which they were entitled for compensation while engaged in the discharge of their duties, and that there was no evidence how long they were engaged in the general business of the county.

That the sum charged for the salary of the clerk was the whole salary to which he was entitled, and that there was no evidence how long he was occupied in transacting the general business of the county. That the advertisements charged were for calling meetings of the Levy Court. That the express charged, was to summon a member of the Court to attend a meeting. That the rooms charged, were for the general use of the Levy Court. That the charge for assessment, was for assessment of property out of the city of Washington preparatory to laying a tax on the said property; and that the charge for commissions on collection, was on the collection of taxes laid by the Levy Court on real estate in the said county, out of the limits of the city of Washington, by a collector of taxes appointed by the Levy Court.

By the Act of Congress of the 24th of February, 1804, § 4, [2 Stat. at Large, 254,] it was enacted, "That the Levy Court of the county of Washington shall not hereafter possess the power of imposing any tax on the inhabitants of the city of Washington."

The COURT (*nem. con.*) was of opinion that all the items were properly general expenses, and ought to be allowed, except the charge for discounts.

The judgment of the Court, as entered on the minutes of the Court was as follows:—"This case coming on at the application of the Levy Court, upon notice admitted to the defendants, and on their appearance by counsel, and consenting to the settlement of this account according to the 11th section of the Act of Congress of July 1, 1812; the Court is of opinion that all the items charged in this account are of general expenses except the item charged for discounts, \$92.40, and do determine and settle the within account accordingly, and adjudge the balance there stated of \$2,291.78 to be due from the said corporation of the city of Washington, and that they pay the same with costs."

OKELY v. BOYD.

An execution issued by order of the President of the Bank of Columbia, without any previous judgment, under the 14th section of the Maryland Act of 1793, c. 30. en-

titled "An act to establish a bank in the District of Columbia," must show upon its face all the facts necessary to justify the clerk in issuing it.

THIS was an action of *replevin* against the marshal of the District of Columbia, to replevy the plaintiff's goods taken in execution upon two writs of *fiery facias* issued by the clerk of this Court on the 19th of June, 1816, (No. 7 and 8 on the judicial docket of December term, 1816,) one for \$1,000, and the other for \$900, upon the order of the President of the Bank of Columbia, in virtue of the authority vested in him by the 14th section of the Act of Maryland, of 1793, c. 30, entitled "an act to establish a bank in the District of Columbia;" by which it was enacted, "That whenever any person or persons are indebted to the said bank for moneys borrowed by them, or for bonds, bills or notes given or indorsed by them, with an express consent in writing that they may be made negotiable at the said bank, and shall refuse or neglect to make payment at the time the same become due, the president shall cause a demand in writing on the person of the said delinquent or delinquents, having consented as aforesaid, or, if not to be found, have the same left at his last place of abode; and if the money so due shall not be paid within ten days after such demand made, or notice left at his last place of abode as aforesaid, it shall and may be lawful for the president, at his election, to write to the clerk of the General Court, or the court of the county in which the said delinquent or delinquents may reside, or did, at the time he or they contracted the debt, reside, and send to the said clerk the bond, bill or note due, with proof of the demand made as aforesaid, and order the said clerk to issue a *capias ad satisfaciendum*, *fiery facias*, or attachment by way of execution, on which the debt and costs may be levied by selling the property of the defendant for the sum or sums of money mentioned in the said bond, bill, or note; and the clerk of the general court, and the clerks of the several county courts are hereby respectively required to issue such execution or executions, which shall be made returnable to the court, whose clerk shall issue the same, which shall first sit after the issuing thereof, and shall be as valid and as effectual in law to all intents and purposes, as if the same had issued on judgment regularly obtained in the ordinary course of proceeding in the said court; and such execution or executions, shall not be liable to be stayed or delayed by any *supersedeas*, writ of error, appeal or injunction from the chancellor; provided always, that before any execution shall issue as aforesaid, the president of the bank shall make an oath," "ascertaining whether the whole or what part of the debt due to the bank on the said

bond, bill or note, is due; which oath or affirmation shall be filed in the office of the clerk of the court from which the execution shall issue; and if the defendant shall dispute the whole or any part of the said debt, on the return of the execution, the court before whom it is returned shall and may order an issue to be joined and trial to be had at the same court at which the return is made, and shall make such other proceedings that justice may be done in the speediest manner."

The execution (No. 7) recited that whereas, in virtue of the Act of Maryland, 1793, c. 30, entitled "An act to establish a Bank in the District of Columbia," John Mason, Esquire, President of the said Bank of Columbia, hath this day (19th of June, 1816,) filed in the Circuit Court of the district aforesaid, for the county of Washington, a certain note, commonly called a promissory note, drawn by a certain John Okely, and dated at Georgetown, on the 16th day of February, 1816, and thereby, sixty days after the date thereof, the said John Okely promised to pay to a certain Hyatt and Wilson, by the name of Hyatt & Wilson, or order, one thousand dollars, value received; and by the said Hyatt & Wilson indorsed payable to the President, Directors and Company of the Bank of Columbia for value received; upon which said note, so indorsed, the said president of the said bank hath ordered and directed the clerk of the said Circuit Court to issue the writ of the United States of *feri facias* against the said John Okely in the name of the said President, Directors and Company of the Bank of Columbia, for the sum of one thousand dollars current money, and also the costs of the said *feri facias*. And as it appears by the proofs annexed to, and exhibited with the said note, that the requisites of the said Act of Assembly have been fully complied with; therefore you are hereby commanded that of the goods and chattels, &c. you cause to be made, &c., returnable on the 4th Monday in December, 1816.

On the 9th of October, 1816, at an adjourned session of June term, a rule was obtained by Okely against the bank to show cause on the next Monday why these executions should not be quashed, as being illegal, null, and void. The rule was served but no order thereupon at that session.

On the 19th of November, 1816, Okely replevied the goods; and at June term, 1819, (No. 36 Trials,) the cause came on for trial; a jury was sworn, but a juror was withdrawn, by consent, and the motion to quash the executions seems to have been revived, and was argued by *Mr. Jones*, for the plaintiff Okely, and *Mr. Key*, for the bank.

For the plaintiff, in replevin, it was said, that the act, being in derogation of common right, must be construed strictly. If

the execution were upon a judgment, that judgment must be truly recited and certain. All the facts should appear upon the face of the execution which are necessary to show the right of the bank to have the execution, and the authority of the clerk to issue it. It is not sufficient for the clerk to state that it appears to him that the requisites of the act have been fully complied with. He only states that it appears by the proofs annexed to and exhibited with the note; and although he states that the note was filed in the Court, and the proofs being annexed to it may be presumed to be also filed, yet the act does not require the note or proofs to be filed, and the filing them does not make them matter of record so that the Court can judicially take notice of them, or the clerk officially refer to them. They might as well be referred to as being in the vaults of the bank.

But if the Court could judicially take notice of the note and the proofs, there are several objections to the writ.

1. It contains no averment, nor is there any proof, that the note was not paid "at the time the same became due;" nor is there an averment that the president of the bank caused "a demand in writing on the person of the delinquent;" nor that he was not to be found; nor that the president wrote to the clerk, or sent his order in writing.

2. There is no averment in the execution, that there was an express consent in writing that the note should be made negotiable at the Bank of Columbia, nor is the note described as "negotiable at the Bank of Columbia," although the note referred to by the clerk has those words in it.

The execution (No. 8) for \$900 describes the note upon which it was issued, as a note made by Okely, dated at Georgetown on the 7th of March, 1816, by which, sixty days after the date thereof, he promised to pay A. J. Hyatt, or order, \$900, value received, "negotiable at the Bank of Columbia." In other respects it was liable to all the objections to which the other execution was liable.

For the bank, it was contended, that the Court was not bound by the recital in the execution, but may and ought to look behind it, and see whether the documents furnished by the bank authorized the clerk to issue the execution, whatever its recitals, whatever its omissions might be. It was not necessary that it should recite or state any facts but the order and oath of the president of the bank. The execution, in its recitals, conforms exactly to the precedent in 2 Harris's Entries, 637, which refers in the same manner to the note and proofs.

It was not necessary that any thing should be filed, but the oath of the president; but the other documents, if required to be

 Armat v. The Union Bank of Georgetown.

sent to the clerk, must be filed by him, and become part of the record upon which the execution issues, and may be examined by the Court. The oath of the president, is evidence that the note was not paid when the same became due, and that \$1000 were due with interest, and the defendant must have refused or neglected to pay it when due, or it could not have been due with interest. The oath of the president is all that is necessary to justify the execution. If there be any defence, the defendant may avail himself of it on the return of the execution.

The clerk could only aver that it appears by the papers filed, that the requisites have been complied with.

The defendant, by making the note "negotiable at the Bank of Columbia," has consented to the process.

The COURT quashed the execution for \$1000, (No. 7), *nem. con.*, and the execution for \$900, (No. 8), MORSELL, J., dissenting.

[NOTE. In the case of the *Bank of Columbia v. Okely*, (4 Wheat. 235,) the Supreme Court decided that the 14th section of the charter of that bank was not unconstitutional, and that the clerk of this Court was competent to issue the execution upon the order of the president.

That section of the charter, however, was repealed by the 8th section of the Act of Congress of the 2d of March, 1821, [3 Stat. at Large, 618,] entitled "An act to extend the charters of certain banks in the District of Columbia."]

 CHRISTOPHER ARMAT v. THE UNION BANK OF GEORGETOWN.

If the owner of a bank-note lose one half of it, he may recover the amount of the whole note, in an action against the bank which issued it, the plaintiff having offered security to indemnify the bank against the claim of any other person upon the lost half.

THIS cause was submitted to the Court upon the following case stated, by *Mr. Key*, for the plaintiff, and *Mr. Jones*, for the defendant.

A note for \$100, duly issued and put in circulation as cash by the Union Bank of Georgetown, was cut in two by one T. C. Amory and one of the said halves remitted in payment by him to the plaintiff by mail from Gloucester Court-House to Baltimore; but never arrived by mail, nor in any other manner came to the hands of the plaintiff; but has ever since the said remittance, been missing, and never since heard of, and is lost to the plaintiff. That said Amory afterwards, and before the institution of this suit, delivered the remaining half to the plaintiff, who presented

it to the bank and demanded payment of the whole sum of \$100 ; at the same time offering to prove to the satisfaction of the said bank, the miscarriage and loss of the other half, and to indemnify them by security against any loss from the reappearance and demand of the half so lost. The said half so presented is hereto annexed, and it is agreed that the said note, before the same was cut as aforesaid, was in the form hereunto annexed ; and was one of a considerable number of one hundred dollar notes issued and put in circulation by the said bank, and not otherwise distinguishable from the said note, than by a certain number and letter on the left of each of the said notes respectively.

The said defendants offered to pay to the plaintiff, on presentation of the said half, one half of the amount of the said original note, that is to say, \$50 ; but refused to pay the other half.

It is agreed to be the custom of the said bank, and of banks generally, to pay one half of the original sum due upon the whole note, upon presenting one half of a cut note, without accounting at all for the other half.

The point now submitted is, whether the said bank is not bound to pay the whole amount of the original note, upon due proof of the loss of one half of the note, and an offer to indemnify as aforesaid.

Mr. Key, for the plaintiff. If the whole note had been lost, and the plaintiff had offered indemnity, he would have been entitled to recover, as upon a lost note. A man does not lose his debt, by losing the best evidence of it.

Mr. Jones, for the defendant. The \$100 notes are only distinguishable from each other by a number on the left half. These notes pass as cash. They are payable to bearer. Trover will not lie for them. If stolen and presented by a *bonâ fide* holder, the bank is liable. *Pearson v. Hutchinson*, 2 Camp. 211 ; *Grant v. Vaughan*, 3 Burr. 1516 ; *Peacock v. Rhodes*, Doug. 633.

The custom to pay half was generally known, and an agreement may be presumed to that effect. The innocent holder of the other half, may, perhaps, show as good a right to recover upon it as the present plaintiff. It was payable to the bearer on demand.

The COURT (*nem. con.*) said : This is to be considered as a note destroyed. The plaintiff is admitted to have been owner of the whole note. The holder of the other half cannot aver the same fact, and therefore can never recover upon it.

Judgment for the plaintiff.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1819, AT ALEXANDRIA.

WISE'S EXECUTOR *v.* RESLER'S EXECUTRIX.

In the year 1796, A. covenanted with B. to pay rent to the "heirs and assigns" of C. a citizen of the United States, who had died in the year 1785, having as his nearest of kin and heir at law, a sister who was then an alien, and a British subject, and who was born and always resided in Scotland; *held*, that the executor of B. might recover the rents against the executor of A. in an action of covenant for the use of the sister, notwithstanding her alienage.

THE parties agreed upon a state of the facts, as follows:—

Wise, in 1796, conveyed a lot of ground in Alexandria to Resler, in fee, rendering an annual rent, to be paid "to the heirs and assigns" of one John Adams, a citizen of the United States, who had died in the year 1785, leaving as his next of kin and heir at law, his sister Janette Barrett, who was an alien, born in Scotland, and who always resided there.

The rent being in arrear, the executor of Wise brought this action of covenant against the executrix of Resler, to recover the rents for the use of Janette Barrett, the alien heir.

Mr. Swann, for the defendant, contended that as this suit was brought for the use of Janette Barrett, her alienage was a bar, because she could not take real estate by descent, nor claim as heir at law.

Mr. N. Herbert, *contrà*.

The COURT (*nem. con.*) was of opinion that the plaintiff was entitled to recover.

Judgment for the plaintiff.

AULD *et al.* *v.* T. W. PEYTON.

Demand of payment of a note must be made on the last day of grace.

ASSUMPSIT, against the indorser of a promissory note. No demand of payment was made until the day after the last day

United States v. O'Neale.

of grace, on which day payment was demanded and the note protested.

The COURT (*nem. con.*) said that there must be evidence of a demand upon the last day of grace.

Verdict for the defendant.

BANK OF ALEXANDRIA v. PETER SAUNDERS.

If a bank discount a note, knowing that it was the intention of the party offering it, that the proceeds should be applied to discharge a particular note held by the bank, those proceeds cannot be applied by the bank to the discharge of any other note.

ASSUMPSIT against the indorser of a note made by John McPherson & Son, for \$3000, upon which the bank had discounted \$2500 for the accommodation of John McPherson & Son, on the 18th of March, 1817, and which fell due on the 20th of May, 1817; on which day the bank discounted a new note of John McPherson & Son, indorsed by the defendant for \$2500, and protested the note for \$3000, and applied the new discount to other claims against John McPherson & Son upon their notes indorsed by the defendant.

The COURT, (MORSELL, J., *contrà*,) at the prayer of the defendant's counsel, instructed the jury, that if they should be satisfied by the evidence, that the note for \$2500, dated on the 20th of May, 1817, was drawn, indorsed, and offered to the bank for discount, with the intent to renew, or pay the note for \$3000 falling due on that day, and that the bank discounted it, knowing that it was so offered with that intent, the bank was bound so to apply the proceeds of the new discount, and could not now recover upon the note for \$3000.

Verdict for the defendant.

UNITED STATES v. O'NEALE, DESMUKES *et al.*

It is an indictable offence to combine to oppose the execution of a warrant issued by a justice of the peace, without knowing the nature of it; and assaulting one of the parties attempting to execute it. Upon the validity of the warrant the Court expressed no opinion.

INDICTMENT for assault and battery on one Murray, a constable.

It appeared in evidence that Mr. Faw, a justice of the peace, issued his warrant against A. Locke and B. Locke for an assault upon one James Middleton, and a battery on a negro, the execu-

tion of which warrant was prevented by force; whereupon Mr. Hoffman, another justice of the peace, issued his warrant to Murray, the constable, to summon a posse, and to take the said A. and B. Locke, "and all others who had obstructed or should obstruct the execution of Mr. Faw's warrant." After the jury had retired, they came into court and prayed the instruction of the Court as to the legality of the warrant.

Mr. Jones, the attorney for the United States, admitted that the warrant of Mr. Hoffman was illegal, so far as it required the arrest of "all such persons as had obstructed," &c., without naming them, or describing them, or stating that their names were unknown. But he contended that it was immaterial whether the warrant was legal or not, because the defendants had made the first assault. The warrant, however, was not wholly void; it was good as to the arrest of A. and B. Locke. Besides, the warrant was altogether unnecessary; it was the duty of all persons to aid in the execution of the former warrant; and to suppress the riot.

Mr. Hewell, for the defendants, contended that the warrant could not be good in part and void in part.

The Court (*nem. con.*) at the prayer of Mr. Jones, instructed the jury, that if they should be satisfied by the evidence, that the traversers and others were combined to oppose the execution of the warrant, without knowing the nature of it, and actually assaulted one of the constable's party before any assault had been made by any one of the constable's party in attempting to execute the warrant, the traversers were guilty.

The jury found some of the traversers guilty, and others not guilty.

JAMES A. GRANT v. JOHN BONTZ.

An action of assumpsit, in the nature of an action of deceit will lie for knowingly and falsely representing a slave sold by the defendant to the plaintiff, to be sound, although there should be a bill of sale under seal warranting the slave to be a slave for life, without expressly warranting the soundness of the slave.

THE declaration in this case was drawn from the precedent in the case of *Stuart v. Wilkins*, Doug. 20, the form of which was fully approved by all the judges of the Court of King's Bench.

It stated that, whereas the defendant, on the 1st of August, 1816, offered to sell to the plaintiff a certain slave called Celia, and a certain other slave called Julia, of him the defendant, and whereupon afterwards, to wit, &c., in consideration that the plaintiff at the special instance and request of the defendant would buy

Grant v. Bontz.

of him, the said defendant, the said slaves at and for the price and sum of \$675 to be paid by the plaintiff to the defendant upon demand, the defendant then and there undertook and faithfully promised the plaintiff that the said slaves were sound; and the plaintiff, in fact saith that he, confiding in the promise and undertaking of the defendant so by him made as aforesaid, afterwards, to wit, &c., at the special instance and request of the defendant, did buy of him the said slaves at and for the price of \$675 and did then and there pay the same to the defendant; yet the defendant, not regarding his said promise and undertaking so as aforesaid made, but contriving and fraudulently intending to injure the plaintiff in this behalf, did not regard his said promise and undertaking so by him made as aforesaid, but craftily and subtly deceived the said plaintiff, in this, that the said slave Celia, at the time of the making of the said promise and undertaking of the defendant, was not sound, but on the contrary thereof was unsound, and was afflicted with the misfortune of idiocy, to wit, at the county aforesaid, of which the defendant, at the time of his promise aforesaid, was well informed, whereby the said slave then and there became and is of no use or value to the plaintiff.

To this was added a count for money had and received by the defendant to the plaintiff's use.

At the trial the defendant demurred to the evidence, and the plaintiff joined in the demurrer.

The plaintiff's evidence proved the idiocy and worthlessness of the slave Celia. That the defendant knew it at the time of the sale, but represented her to the plaintiff as sound; that the plaintiff bought her and paid the defendant \$350 for her upon that representation. That although the plaintiff saw her before he purchased her, yet the defendant prevented the plaintiff from speaking with her, under the pretence that she might run away if she knew that he was about to sell her. That the money was paid in the morning before she was delivered to the plaintiff. That when she was delivered to the plaintiff and he spoke to her he immediately perceived that she was an idiot, and offered to return her, but the defendant refused to receive her; and the plaintiff lodged her in the jail, where she died in less than a month after the sale.

The bill of sale was in these words and figures.

"Alexandria, August 1st, 1816. Received of James A. Grant six hundred and seventy-five dollars in full for the purchase of two negro girl slaves for life, namely Julia, and Celia, the right and title of which negroes I hereby warrant and defend against all claims unto said Grant and his heirs forever, as witness my hand and seal. John Bontz, [L. s.] In presence of P. Hewitt."

Mr. Swann, for the defendant, contended, that as the contract of sale was reduced to writing under seal, and contained a warranty of title, but not of soundness, it is to be inferred that no warranty of soundness was intended. That a false representation if not fraudulently made, will not support any action; and if made fraudulently, can only maintain an action of deceit; not an action of assumpsit. No action will lie unless upon a warranty, or upon a fraudulent misrepresentation. 1 Bac. Ab. tit. Action on the Case, E. *Seixas v. Woods*, 2 Caines, 48, 56; *Parkinson v. Lee*, 2 East, 314; *Snell v. Moses*, 1 Johns. 96; *Perry v. Aaron*, Id. 129; *Defreeze v. Trumper*, Id. 274; *Bayard v. Malcom*, Id. 453; *Bayard v. Malcom*, 2 Johns. 550.

Mr. Taylor, for the plaintiff, cited *Stuart v. Wilkins*, Doug. 20, and 1 Chitty on Pleading, tit. Deceit.

At April term, 1820, the plaintiff, upon discovery of further evidence, before the Court had rendered any judgment, or given any opinion upon the demurrer to the evidence, obtained an order for a new trial upon condition of paying the costs. But at November term, 1820, that order was, by consent, rescinded, and the verdict and demurrer reinstated; and

The Court, upon consideration of the demurrer, was of opinion that the law was for the plaintiff, and judgment was rendered for \$370, according to the verdict.

LOCKE v. CANNON.

Upon a common-law attachment under the Virginia Statute of 26th December, 1792, § 6. the Court may, in its discretion, suffer the principal defendant to appear without bail, and without discharging the attached effects, at the first term after the return of the attachment, to plead to the jurisdiction.

This was a common-law attachment, against an absconding debtor, issued by a justice of the peace, under the Act of Virginia, of 26th of December, 1792, §§ 6, 7, 8, p. 116. A vessel belonging to the defendant and one Primus Woodland, was attached and judgment entered at this term, which was the first term after the return of the attachment.

Mr. Mason, for the defendant, offered to appear without bail, for the purpose of pleading that the defendant was never an inhabitant of the District of Columbia, and therefore could not be an absconding debtor, and the justice had no jurisdiction to issue the attachment.

Mr. Swann, for the plaintiff, contended that the defendant could not appear without bail.

Munroe's Executors v. Mandeville.

Mr. Mason, in reply. If bail be given the defendant can only plead to the debt; not to the jurisdiction.

The COURT (MORSELL, J., absent,) set aside the judgment, and permitted *Mr. Mason* to appear for the defendant without bail, and without discharging the attached effects; and to plead to the jurisdiction as suggested.

MUNROE'S EXECUTOR v. TOWERS, Special bail of McLaughlin.

Bail will not be exonerated upon *scire facias*, by the discharge of the principal under the Insolvent Act, unless the discharge was before the appearance-day of the first *scire facias* returned executed, or of the second returned *nihil*.

THE *scire facias*, in this cause, was issued on the 15th of September, 1818, returnable to the next November term.

At November term, 1819, *Mr. Mason*, for the defendant, *Towers*, moved the Court to discharge the bail, because the principal, *McLaughlin*, had been discharged under the Insolvent Act, in Washington, on the appearance-day of the first *scire facias*, returned executed. That as the defendant was in actual custody in Washington during the whole of that term, and had petitioned for relief under the Insolvent Act, upon showing that fact the Court might have ordered an *exoneretur*; and the Court may now consider that as having been done, which might have been done. The Court here would not have ordered the principal to be brought from Washington by *habeas corpus* to be surrendered here. 1 Bac. Ab. Amer. ed. 343, D.; *Coleman & Caines's cases*, 66; *Donnelly v. Dunn*, 1 B. & P. 450; *Robertson v. Patterson*, 7 East, 405; S. C. 3 Smith, 556.

Mr. Taylor, *contrà*. The bail should not be discharged, unless they could have surrendered the principal at the time of his discharge under the Insolvent Act; and the appearance-day of the *scire facias* was too late. The Act of Virginia, of the 12th of December, 1792, § 31, p. 79, is peremptory that the surrender must be before the appearance-day of the first *scire facias* returned executed, or the second returned *nihil*. The Court would not have entered an *exoneretur* before the actual discharge of the principal because they could not know that he would be discharged.

The COURT (MORSELL, J., absent,) refused to discharge the bail.

MUNROE'S EXECUTORS v. R. & J. MANDEVILLE.

A demand of payment of a note on the third day of grace, after bank hours, and notice

Neale v. Janney.

to the indorser and protest on the same day, are not too soon, if the note is in bank for collection, and the maker has been notified thereof; such being the usage of the banks.

ASSUMPSIT against the defendants as indorsers of J. F. Caldwell's promissory note. The note was deposited in a bank in Alexandria, for collection. The maker had notice, before the expiration of the days of grace, that it was so deposited. Payment was demanded of the maker, after bank hours on the third day of grace, and notice given to the defendants, on the same day, that the maker had not paid. The general usage to deposit notes in the bank, for collection, was known by the defendants, and that bank hours closed at 3 o'clock, P. M. The note was not made payable at any bank. It was protested on the third day of grace, after the demand and notice aforesaid.

The COURT (THRUSTON, J., absent,) after taking time to consider till the next term, rendered judgment for the plaintiffs, upon the case stated.

Mr. Taylor, for the plaintiffs, had cited *Parker v. Gordon*, 7 East, 385.

CHRISTOPHER NEALE *et al.* v. JOHN JANNEY.

The private banking institution, known by the name of The Union Bank of Alexandria, had not, before it obtained its charter, any specific lien on the stock of its stockholders.

THIS was a special action upon the case, brought by the plaintiffs as assignees of Gerrard Plummer, survivor of the firm of Jerome & Gerrard Plummer, against the defendant as President of the Union Bank of Alexandria, for not transferring to the plaintiffs 600 shares of the stock of that bank, which J. & G. Plummer had assigned to him in trust to secure payment of 2000 dollars loaned to them by the bank, the plaintiffs having tendered that sum in full to the defendant as president of the bank, who refused to transfer the stock because the Plummers were indebted upon other notes discounted by the bank for their accommodation. The assignment to the defendant was made on the 31st of May, 1816. The note which was secured by it fell due on the 21st, 24th January, 1817. Jerome Plummer died on the 31st of December, 1816. The assignment by Gerrard, the survivor, was made by a deed of trust duly executed, acknowledged, and recorded, dated the 8th of January, 1817. The tender of the 2000 dollars by the plaintiffs to the defendant was on the 8th of February, 1817, before which day the other notes which had been discounted by the bank for the accommodation of the Plum-

mers, to the amount of 5,500 dollars, had become payable and were unpaid. The charter was granted March 3d, 1817. By the 4th article of the association, it was declared that, "every stockholder may sell and transfer his stock in the said bank, or any part thereof, at his pleasure, not being less than one complete share or shares, the transfer being made in the bank books in the presence and with the approbation of the proprietor or his lawful attorney." The assignment to the plaintiffs was not made on the books of the bank, but was contained in a general deed of assignment of all the effects of the firm of Jerome & Gerard Plummer.

By the 11th section of the Act of Congress, of the 3d of March, 1817, [3 Stat. at Large, 383,] which incorporated the bank, it is enacted that the shares shall be transferable only on the books of the bank; but all debts actually due and payable to the bank (days of grace for payment being passed,) by a stockholder requesting a transfer, must be satisfied before such transfer shall be made, until the president and directors shall direct to the contrary.

These facts being found by a special verdict, the case was argued by *Mr. Taylor*, for the plaintiffs, and *Mr. Swann*, for the defendant.

The COURT at November term, 1820, (THRUSTON, J., absent,) rendered judgment on the special verdict for the plaintiff, observing that the rights of all the parties were fixed before the charter; and that until the charter the bank had no general lien on the stock of individual stockholders.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1819, AT WASHINGTON.

SARAH S. KEILER *v.* JOHN LESSFORD AND WIFE.

Words, charging the plaintiff, a single woman, with incontinence, are not actionable without an allegation of special damage.

THIS was an action for words spoken by the defendant's wife, charging the plaintiff with gross incontinence. The jury found a verdict for the plaintiff with 130 dollars damages.

Mr. Key, for the defendants, moved in arrest of judgment, contending that the words were not actionable *per se* in this country, as the plaintiff could not be liable to punishment, nor even to ecclesiastical censure, for fornication.

Mr. Jones, for the plaintiff, cited 3 Bl. Com. 123, 124; 6 Bac. Ab. 221; *Medhurst v. Balam*, 1 Roll. Ab. 35, l. 20, and *Ann Davis's case*, 4 Co. 16, 17.

The COURT having taken time to consider, arrested the judgment, at October term, 1822, because the words were not actionable without special damages.

GARRETT *v.* WOODWARD & YERBY. GRAHAM *v.* THE SAME.

The magistrate who takes a deposition under the 30th section of the Judiciary Act of 1789, must certify that the deponent was "carefully examined, and cautioned, and sworn or affirmed, to testify the whole truth." It is not sufficient that he certify that previous to the taking of the deposition the deponent was by him carefully examined, cautioned, and affirmed, to testify the whole truth concerning all the matters touching which he should be questioned, although one of the interrogatories should be: "If you know any thing further, material to plaintiff or defendant in the cause, mention it, and conceal nothing."

If the defendant will not, upon notice, produce at the trial a material paper, in his possession, the plaintiff may give parol evidence of its contents.

In an action brought to charge the defendant Y. as a secret partner with the other defendant W. after having given competent evidence to prove the partnership, the declarations of W. the ostensible partner may be given in evidence to show that the debt due to the plaintiff was a debt due by the partnership.

THESE suits were brought to charge the defendant Yerby, as a secret partner with the defendant Woodward.

The deposition of Anthony Elton, taken by the mayor of Philadelphia, under the 30th section of the judiciary act of 1789, [1 Stat. at Large, 73,] was offered in evidence on the part of the plaintiff.

Mr. Jones, for the defendant, objected to it, because the mayor had not certified that the deponent was "carefully examined, and cautioned, and sworn or affirmed to testify the whole truth." The mayor had certified that the deposition was taken upon the interrogatories thereunto annexed, the last of which was in these words: "If you know any thing further, material to plaintiff or defendant in the cause, mention it, and conceal nothing." He further certified that the deposition was reduced to writing by the witness and subscribed by him in his own handwriting, in his (the mayor's) presence; and that previous to the taking thereof the deponent was, by him, carefully examined, cautioned, and affirmed to testify the truth concerning all the matters touching which he should be questioned.

The COURT, (*nem. con.*) sustained the objection, and rejected the deposition.

The plaintiffs having given notice to both of the defendants to produce at the trial, a paper purporting to be articles of copartnership between the defendants, and to be signed by both of them, and witnessed by a Mr. Lang, and having proved such a paper to have been in the possession of Woodward, one of the defendants, and the same not being produced, the plaintiffs offered to prove the contents by parol evidence.

Mr. Jones and *Mr. Key*, for the defendant Yerby, objected that Yerby was charged as a dormant partner. That the defendant Woodward was interested and combined with the plaintiffs in the endeavor to establish the partnership; and that Yerby cannot be charged by the confessions or the acts of the other defendant until a partnership shall have been first proved.

The COURT however, (CRANCH, C. J., not concurring,) permitted parol evidence to be given of the contents of the paper; and the defendant Yerby took a bill of exceptions.

The plaintiffs having given evidence of a partnership in the name and firm of Thomas Woodward, the confessions of the defendant Woodward were permitted by the Court to be given in evidence, to show that the debt due to the plaintiffs was a debt due from the partnership.

BENJAMIN PRITCHARD v. CORPORATION OF GEORGETOWN.

An action on the case will lie against a corporation aggregate, for damage done by its agent in raising the level of a street above the graduation fixed by a previous by-

Pritchard v. Corporation of Georgetown.

law, if it be done ignorantly or negligently by the agent; but not if done by the agent knowingly and wilfully.

A witness who is interested cannot be compelled to testify against his interest.

In order to make the corporation liable for damages, it is not necessary that the act should have been ordered by a by-law, or by any written order to the agent. If done by the agent by the previous authority, or subsequent assent of the corporation, it is liable.

THIS was an action upon the case against the corporation of Georgetown, by its corporate name, to recover damages for injury done to the plaintiff's house and lot by raising the level of the street after the plaintiff had built a house, accommodated to a previous level fixed by a by-law of the corporation.

There had been no proceedings in the nature of a writ of *ad quod damnum*, according to the 12th section of the Act of Congress, of the 3d of March, 1805, [2 Stat. at Large, 332,] "to amend the charter of Georgetown," or of the 4th section of the Act of Congress of the 3d of March, 1809, [2 Stat. at Large, 537,] supplementary to the act to amend the charter. The power given to the corporation by those acts, to open, extend, and regulate the streets, is accompanied by an express condition that they make just compensation to the persons thereby injured.

Mr. Key and *Mr. Dunlop*, for the defendants, contended,

1st. That no action for a tort will lie against a corporation aggregate unless for an act within their corporate powers. *Doe v. Woodman*, 8 East, 228; *Chitty on Pleading*, 66.

2d. That the corporation is not responsible for the acts of its agents unless done within the scope of their authority as agents. *Chitty on Pleading*, 68; *M Manus v. Crickett*, 1 East, 106; 1 Bl. Com. 432, *Christian's note*, (26.)

Mr. Jones, contra, cited *Chitty on Pleading*, 98, and contended that the Supreme Court of the United States in the case of *Patterson v. The Bank of Columbia*, had overruled the doctrine that a corporation aggregate is not liable for torts. That this action lies upon the general principle that if any injury is done to an individual for the general benefit, the public should make compensation. This principle is sanctioned by the 12th section of the amended charter of 1805, and the 4th section of that of 1809. If done by the agents of the corporation, it is not necessary, in order to make the corporation liable, that the orders should have been in writing. Whether the agents acted by the authority of the corporation, is a question for the jury. If done by the agents in their official capacity, and it has been sanctioned by the corporation, it is liable; or if the agents did it ignorantly or negligently. If suit had been brought against the agents, they would have pleaded that they did it officially, &c.

The COURT (CRANCH, C. J., doubting,) was of opinion, that there was no objection to the form of the action.

 ORR v. INGLE.

That if the act was done by the agents, ignorantly or negligently, the corporation is liable; but not if done by the agents, knowingly and wilfully. Verdict for plaintiff, \$300.

NEIL v. ABBOTT, Administrator of Campbell, survivor of Campbell and Matlock.

The offer of terms of compromise is not sufficient to take the case out of the statute of limitations.

To take the case out of the statute of limitations the plaintiff offered evidence of the acknowledgments of the defendant's intestate, Campbell, when offering a compromise, viz.: that Campbell acknowledged the debt to be due by Campbell and Matlock, and offered to pay one half, although he said he was discharged by the insolvent law of Missouri, if the plaintiff would give him time.

Mr. Key, for the defendant, objected to this evidence, and cited *Baird v. Rice*, 1 Call, 26.

Mr. Marbury, *contrà*, cited 3 Esp. 113.

January 20th, 1820, the COURT (THRUSTON, J., *contrà*,) decided that the acknowledgment, under those circumstances could not be given in evidence. Verdict for defendant.

SKINNER v. McCaffrey.

If the verdict be below the jurisdiction of the Court, the jury is not entitled to the fee of twelve shillings.

In an action of *assumpsit*, the jury brought in a verdict for thirteen dollars. This Court has not jurisdiction in cases under twenty dollars, and therefore could not render a judgment. It became a question whether the jury was entitled to the fee of twelve shillings.

The COURT refused to order either party to pay the fee.

BENJAMIN G. ORR v. WILLIAM INGLE.

Quære, whether a replevin-bond is sufficient with one surety. Whether the law of Maryland respecting replevins for property distrained for public dues or taxes, is applicable to replevins for property distrained for corporation taxes. Whether pro-

perty distrained for city taxes by a city collector is in the custody of the law, and thereby protected against replevins.

THIS was a replevin for a negro man slave and two horses, distrained by the defendant, who was collector for the 3d ward in the city of Washington, for taxes imposed by a by-law of the corporation, under the power, given by the charter, to lay and collect taxes.

Upon the return of the writ, *Mr. Law*, for the defendant, moved the Court to quash it;

1st. Because there was only one surety in the replevin bond.

2d. Because the property was distrained for public dues and taxes, within the meaning of the Acts of Maryland, 1785, c. 34, and 1793, c. 53, forbidding replevin for property distrained for public dues and taxes except in certain cases.

3d. Because the property distrained was in the custody of the law.

1. The English statute of 13 Eliz. 1, c. 2, (West. 2,) which was in force in Maryland, requires the sheriff to take "pledges," and the statute of 11 Geo. 2, c. 19, § 23, requires two sureties in replevin of distress for rent, and the practice has always been both in England and in Maryland, to require two sureties. And the 12th section of the Maryland Act of 1790, c. 53, says, "Provided always that before any clerk shall issue a writ of replevin, in virtue of this act, the plaintiff or plaintiffs shall enter into bond, with two sufficient sureties, in double the value of the property to be replevied, in the same manner as in other cases of replevin."

2. The taxes due to an incorporated city are as much public dues, as the county or the State taxes in Maryland; and there is the same reason for the law here as there. The plaintiff should have applied to a justice of the peace and obtained his order according to the Act of 1790, c. 53, before he took out his writ of replevin. In Maryland it has been decided that that act applies as well to county taxes as to State taxes; and if it is applicable to county taxes there is no reason why it should not be equally so to town or city taxes.

3. A distress for taxes is in the nature of an execution; and is so considered by the Maryland law of 1785, c. 34, which says, "Whereas the clerks of the county courts, in several of the counties of this State, have issued writs of replevin in cases where property hath been taken in execution for public dues and taxes, whereby the collection of the said public dues and taxes hath been much impeded to the great injury of the State and individuals. Be it enacted, &c., That in every case of money, or other thing, due the public for satisfaction of which there shall be any

distress or execution of property by any officer or person authorized by law so to do, no writ of replevin shall issue, or be maintainable in law."

Here distress and execution are put on the same footing and the goods seized under either, by a public officer officially are equally in the custody of the law, and therefore cannot be lawfully replevied.

"Public dues or taxes," means any taxes authorized by a public law.

Mr. Jones, contrà. 1. There is no general law which requires two sureties; but if there were, an additional surety can now be given.

2. Taxes due to the corporation are not public dues—they are not due to the public. The public, in the Maryland law, is the great public; the sovereignty of the State. In this district, the public is the United States—the sovereign authority.

The COURT (*nem. con.*) quashed the replevin, without stating on what particular ground.

THORPE & BURTON v. WILLIAM SIMMONS.

In taking *ex parte* depositions under the Act of Congress, the requisites of the act must be strictly pursued.

THE COURT (*nem. con.*) rejected a deposition taken under the Act of Congress of 1789, [1 Stat. at Large, 73,] because the magistrate certified that the form (not "the same" which are words of the act,) was reduced to writing by him, and signed by the witness.

THE UNITED STATES v. SAMUEL BLACK.

Horse-stealing, in the District of Columbia, is punishable as an ordinary larceny, under the Act of Congress of 1790, for the punishment of certain crimes; although, by the Acts of Maryland, 1793, c. 57, § 10, and 1799, c. 61, §§ 1 and 3, the punishment is death, or labor on the roads in Baltimore county.

Where the punishment may be death, the court will allow peremptory challenge.

INDICTMENT for stealing two horses of Coote and Hunter, respectively.

Mr. Jones, for the United States, contended that it was a capital offence, and punishable with death, or labor upon the roads, under the laws of Maryland, 1793, c. 57, § 10, and 1799, c. 61, §§ 1 and 3, and therefore the Court, without deciding that point, allowed the prisoner the right of peremptory challenge.

The jury found the prisoner guilty, and recommended him to mercy.

On a subsequent day, *Mr. Jones*, Attorney for the United States, moved the Court to pass sentence of death, or confinement to hard labor, under the laws of Maryland, adopted by Congress as the law of this part of the District of Columbia.

Mr. Key, for the prisoner, *contra*. By the Act of Congress of the 30th of April, 1790, [1 Stat. at Large, 112,] larceny committed in any of the places under the sole and exclusive jurisdiction of the United States, is punishable by fine and whipping. This Court has a discretion; and if the only alternative be death, or the punishment under the Act of Congress, the Court will take the milder law; especially as the jury has recommended the prisoner to mercy. The Court cannot send him to work on the roads in Baltimore county, as required or permitted by the Maryland law, in lieu of the punishment by death. Nor can the Court condemn the prisoner to any other kind of labor, or at any other place. The law must be strictly pursued. This Court has never sentenced a person under that law.

Mr. Jones, in reply, admitted the weight of use and practice of the Court, in a doubtful case; but not if the law be clear and imperative. The adopted acts of Maryland are as much acts of Congress as the act of 1790, for the punishment of certain crimes against the United States. That act was not made expressly for this district. It was made for forts and arsenals, before this district existed. The Act of Congress, adopting the laws of Maryland for this part of the district, was long subsequent to the act for the punishment of certain crimes, and *quoad hoc* repeals it. But if both had been passed on the same day, the act of Maryland, providing, specifically, for horse-stealing, must prevail, and must be considered as an exception of that species of crime from the general law for the punishment of larceny. In Alexandria county, the particular case of stealing out of a store, is specifically punished. So, in the case of Nathan Way, who was indicted for stealing goods from a store, contrary to the Act of Maryland, 1729, c. 4, § 3, which takes away the benefit of clergy from the offence. The Court may condemn the prisoner to hard labor, which is the essence of the punishment—the place and manner are accidental circumstances only. The inapplicability of the law to the circumstances of the district, if strictly considered, would abrogate a great part of law of Maryland, in this district. The Court must take the substance and apply it to the condition of this part of the district, or the law of Maryland cannot continue in force here.

The Court (*nem. con.*) was of opinion that this Court cannot

execute that part of the Maryland law which authorizes the courts of that State to commute the punishment of death for hard labor on the public roads of Baltimore county, &c. And if the Court should decide that so much of the law is adopted as inflicts the punishment of death, without the alternative of hard labor, the law of Maryland would not be continued in force here, as required by the act of the 27th of February, 1801, [2 Stat. at Large, 103,] concerning the District of Columbia. Therefore, as the offence was punishable under the Act of Congress applicable to all places under the sole and exclusive jurisdiction of the United States, the Court sentenced the prisoner to pay a fine and be publicly whipped, according to the 16th section of the Act of Congress of the 30th of April, 1790, [1 Stat. at Large, 116.]

CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1820, AT ALEXANDRIA.

ROBERT CENTRE, surviving partner of the late firms of Ripley, Centre, & Co. and Ripley & Centre, *v.* NEWTON KEENE.

The magistrate who takes a deposition under the Act of Congress, need not certify that the deponent subscribed it in his presence, but the title of the cause in which it is to be used must be truly stated in the certificate of the caption.

Mr. Taylor, for the defendant, objected to a deposition taken under the Act of Congress, [1 Stat. at Large, 73,] that the magistrate did not certify that the deponent subscribed it in his presence, but that he subscribed it after it was reduced to writing by the magistrate.

But the COURT (THRUSTON, J., absent,) overruled the objection.

Mr. Taylor then objected, that it is stated in the caption that the deposition was taken to be used in an action in which Robert Centre & Co. were plaintiffs.

Mr. Swann, contra. This is evidently the same suit.

The COURT supported the objection, and rejected the deposition; and said they could not judicially know it to be the same cause.

UNITED STATES *v.* WILLIAM READ.

Upon an indictment for feloniously breaking the storehouse of Cook & Clare, and taking therefrom goods of the value of more than four dollars, contrary to the Act of Virginia of the 26th of December, 1792, § 2, which takes away the benefit of clergy, the jury may find the prisoner guilty of simple larceny.

INDICTMENT for feloniously breaking the storehouse of Cook & Clare, and taking therefrom goods of the value of more than four dollars.

The jury having inquired whether they might find the prisoner guilty of simple larceny upon this indictment,

The COURT (MORSELL, J., doubting,) informed them that they might.

The jury accordingly found the defendant guilty of stealing the goods, but not of breaking the storehouse.

WISE'S EXECUTOR v. RESSLER.

In covenant for rent, interest does not accrue until demand.

In the trial, a question arose, whether the jury was bound to give interest on the rents from the time they became demandable, or from the time of actual demand.

The COURT (MORSELL, J., *contra*.) The tenant is not in default until demand; and interest ought not to be given unless from the time of the default of the tenant.

Mr. N. Herbert and *Mr. Taylor*, for the plaintiff.

Mr. Swann, for the defendant.

E. J. LEE v. JAMES D. PATTERSON.

The clerk of this Court may have an attachment for the non-payment of his fees.

MR. LEE, the clerk of this Court, had obtained a rule on James D. Patterson, to show cause why an attachment of contempt should not issue against him for not paying fees due to the clerk. The rule having been served, and Mr. Patterson not having appeared, the rule was made absolute; Mr. Lee having made affidavit that he believed he was able to pay.

Mr. Taylor, for the plaintiff, cited *Cadwell v. Jackson*, 7 Cranch, 276, and 13 Viner, 253.

JOHNSON v. GRIFFITH.

The attachment first served is entitled to priority of payment.

THE COURT (THRUSTON, J., absent,) said the attachment first served, was entitled to priority of payment.

MCCOBB v. TYLER.

The attachment first served on the garnishee binds the effects in his hands, although the marshal had other and prior attachments in his hands at the time of such service.

THIS was an attachment served by summoning John Wheelwright as garnishee, by order of the plaintiff. The marshal had

Deneale's Executrix v. Young.

in his hands a prior writ of attachment upon which he was not required to summon Mr. Wheelwright as garnishee.

Mr. Mason, for the prior attachment. The general rule is that the marshal must first serve that writ which first comes to his hands, and upon any property of which he has any knowledge.

Mr. Taylor, contra. The attachment only binds from and by the levying of it.

The COURT (*nem. con.*) was of opinion that the prior attachment did not affect the money in the hands of Mr. Wheelwright.

VIOLETTE v. TYLER. ENGLISH v. THE SAME.

When the marshal has several writs of attachment put into his hands, he must return all the property as attached on each of them.

Quære, whether the writ which first came to his hands, or the writ first levied, has a preference; or whether the attaching creditors shall come in *pari passu*.

THERE were several writs of attachment at law. Violette's was the first which came to the hands of the marshal. English brought his afterwards, and broke into the house and showed the goods to the marshal, who attached them on Violette's writ as well as English's, and so returned them.

Mr. Swann, for English, claimed the priority, because he had first shown the goods. The law is not the same as upon an execution which binds the goods from the delivery of the writ to the marshal. English is entitled to the benefit of his diligence.

At the last term the Court was divided upon this question. (THRUSTON, J., absent.) At this term it came on again.

The COURT (MORSELL, J., *contra*,) was of opinion that the marshal ought to return both writs levied upon the whole property found; and CRANCH, C. J., was of opinion that the first writ which came to the hands of the marshal had the preference. THRUSTON, J., was of opinion that all the attaching creditors should come in *pari passu*. MORSELL, J., was of opinion that the attachment first levied had priority, but that as both were simultaneously levied, the distribution should be *pari passu*.

GEORGE DENEALE'S EXECUTRIX v. ROBERT YOUNG, Esq., Judge of the Orphans' Court.

An executrix has a right to appeal from a sentence of the Orphans' Court, to this Court, without giving security to prosecute the appeal with effect; and this Court will grant a mandamus accordingly.

Deneale's Executrix v. Young.

ON the motion of Mary Deneale, executrix of the will of George Deneale, a rule was granted her against Robert Young, Esq., the judge of the Orphans' Court, to show cause why a mandamus should not issue commanding him to allow her appeal to this Court from the judgment pronounced by him on the petition of John Stump's agent, without requiring from her the performance of the conditions annexed by him to his order for allowing the said appeal; which conditions were the paying the costs which had accrued, and giving bond and security (pending the appeal,) in the sum of \$15,000, to prosecute her appeal with effect.

After argument by *Mr. Mason*, for the executrix, and *Mr. Swann*, for the judge,

The COURT (*nem. con.*) made the rule absolute and issued the *mandamus*.

CIRCUIT COURT OF THE UNITED STATES.

JUNE TERM, 1820, AT WASHINGTON.

TURNER v. GREEN & JOHNSON.

The making of a promissory note can only be proved by the subscribing witness, if there be one.
Evidence of the confession of the maker that he owes part of it, is not sufficient on the money counts.

ASSUMPSIT, upon a promissory note, and the common money counts.

Mr. Marbury, for the plaintiff, offers to prove the handwriting of the defendants, the makers of the note, by other testimony than that of the subscribing witness, without accounting for his absence.

But the COURT (*nem. con.*) rejected the evidence. He then offered to prove that the defendant, Johnson, confessed a balance of \$300 due on the note, and promised to pay it; and contended that this was good evidence on the count for money had and received.

But the COURT (CRANCH, C. J., doubting,) rejected the evidence.

The COURT offered to save the point, and directed the jury to find a verdict for the plaintiff, subject to the opinion of the Court on the question of evidence, but Mr. Marbury refused to pay the jury fee; and the Court instructed the jury that there was no evidence before them to support the action.

UNITED STATES v. A. T. F. BILL.

In a prosecution against a constable for wantonly sacrificing property taken under execution, the jury cannot find him guilty, unless they should be satisfied that he acted from a corrupt motive.

The defendant, who was a constable, was presented for wantonly sacrificing a carpet taken by him in execution, and sold at a time and place different from the time and place mentioned in the notice of sale.

 Walker v. Johnson.

At the motion of *Mr. Law*, the defendant's counsel, the COURT instructed the jury that before they could find him guilty, they must be satisfied that he acted from a corrupt motive.

Verdict for the defendant.

 SCOTT v. LEWIS.

If the statute of limitations be pleaded after the plea day, without leave of the Court, the plea will, on motion, be ordered to be stricken out.

ASSUMPSIT, upon a promissory note. The rule to plead expired on the second Monday of December, 1818. At the next term, the defendant pleaded the statute of limitations, which was entered (short) and issue joined by the clerk, under the agreement of the bar that the clerk should enter the pleas and make up the issues.

Mr. Caldwell, for the plaintiff, moved the Court to order the plea to be stricken out, under the general rule of the Court that the plea of limitations should not be received unless filed before the expiration of the rule to plead.

The COURT (THRUSTON, J., *contrà*.) ordered the plea to be stricken out.

Mr. Jones, for the defendant.

 TAYLOE v. TURNER.

The rule of damages for not transferring stock according to contract, is the price of the stock on the day on which it ought to have been transferred.

DEBT on bond conditioned to transfer stock of the Washington Bridge Company.

The COURT, (*nem. con.*) at the prayer of the plaintiff's counsel, instructed the jury that the rule of damages was the price of the stock on the day on which it ought to have been transferred according to the contract. See *Shepherd v. Hampton*, 3 Wheat. 200.

 JOSEPH WALKER v. JOSEPH JOHNSON.

A note given for the assignment of the time of an apprentice, being for an illegal consideration, is void.

ASSUMPSIT, on a promissory note, given in consideration of the assignment of the time of an apprentice.

The Union Bank of Georgetown v. Riggs.

Mr. Key, for the defendant, contended that the assignment, being unlawful, was not a sufficient consideration to support the action upon the note.

Mr. Jones, contra, contended, that although the assignment was void, yet the defendant had enjoyed the services of the apprentice, and was bound in conscience to pay the note.

The COURT (THRUSTON, J., *contra*,) was of opinion, that the assignment being void, there was no consideration for the note.

(See the Maryland Act of 1793, c. 45, § 11, which authorizes an assignment of the time of an apprentice, for the benefit of the widow, upon the death of the master.)

THE UNION BANK OF GEORGETOWN v. RIGGS.

The Court will not receive a supplemental affidavit, to obtain a continuance of the cause.

The affidavit for a continuance, on the ground of the absence of a witness, must state that the affiant believes that the cause cannot be tried with safety to the party applying for the continuance, without the attendance of the witness.

THE defendant's affidavit, did not aver that he verily believed that the cause could not be tried with safety to himself, without the attendance of the absent witness.

Mr. Key, for the plaintiff, objected to the continuance, upon the ground that the affidavit was imperfect by reason of the omission of that averment.

Mr. Jones, for the defendant, contended that that averment is only matter of form, and that it is to be inferred from the facts stated.

Mr. Swann, on the same side, stated that it was by his inadvertence that the averment was omitted.

The defendant, being in court, offered an additional affidavit containing the averment.

Mr. Key objected that it was too late; that supplemental affidavits were dangerous, &c.

Mr. Jones contended that it was not too late, as the Court had not given its opinion that the affidavit was insufficient.

The COURT (CRANCH, C. J., *contra*,) refused to continue the cause, because the affidavit, without such an averment, was insufficient; and said they would not receive a supplemental affidavit, after the original affidavit had been laid before the Court, and the defect has been pointed out by the opposite counsel; on account of the strong temptation it would hold out for perjury.

SHIELDS v. MIDDLETON.

A verbal acceptance of an order, drawn at the foot of the account of a third person against the drawer, is not a promise to pay the debt of another within the Statute of Frauds.

ASSUMPSIT, against the acceptor of Bates' bill on the defendant, which was in this form:—

“Washington, December, 1817.

“Mr. Bates, To James Shields, Dr. To 32 brls. lime, at \$3 per brl. \$96.00.

“Mr. J. S. Middleton, Sir, Please to pay the above bill and oblige yours, respectfully, Reuben Bates.”

Mr. Caldwell, for the defendant objected that this is a promise to pay the debt of another, and that as the promise to pay was not in writing, it was void by the Statute of Frauds.

But the COURT (*nem. con.*) instructed the jury that this order was a bill of exchange; that the defendant's promise to pay it was equivalent to an acceptance, and that such an acceptance is not within the statute.

 SHERBURNE v. KING AND LANGLEY.

A replevin discontinued by the non-appearance of the defendant at the first term, may be reinstated at the next, if the omission to enter the appearance was the error of the clerk.

THIS action of replevin was discontinued at the last term (the return term,) by the non-appearance of the defendant, no steps having been taken by the plaintiff to continue the process.

Mr. Ashton, for the defendants, now moved to reinstate it upon affidavit of himself, and one of the defendants, stating that the clerk was at the last term ordered to enter *Mr. Ashton's* appearance for the defendant; and the Court made the following order.

“It appearing to the satisfaction of the Court that the appearance of the defendant by his attorney was omitted to be entered, by the mistake of the clerk, at the last term, it is ordered that his appearance be entered as of the last term, and the cause brought forward upon the docket of this term.”

 GEORGE R. GAITHER v. WILLIAM LEE.

In an action by the indorsee against the acceptor of an inland bill of exchange, the

Gaither v. Lee.

indorser is a competent witness for the defendant to prove usury in the plaintiff's discounting of the bill.

If a bill be drawn, accepted, and indorsed for the purpose of raising money upon it in the market for the use of the payee, and be put into the hands of a broker who obtains the money from the plaintiff upon it, at four per cent. per month discount, the transaction is usurious and the bill void.

ASSUMPSIT, against the acceptor of a bill drawn by John Wells, Jr. upon the defendant, and by him accepted payable to James Hodnett, or order, on the 29th of March, 1819, and indorsed by him and A. McIntire, for \$350. The bill, having seventy-five days to run, was put into the hands of Mr. Nicholls, a broker, to raise money upon it for the use of the drawer. Mr. Nicholls procured the money upon it from the plaintiff, discounting \$25 for the seventy-five days.

Mr. Marbury, for the defendant, offered Hodnett and McIntire, the two indorsers, as witnesses to prove usury; and cited *Braud v. Ackerman*, 5 Esp. Rep. 119; Chitty on Bills, 397, and *Jordaine v. Lashbrooke*, 7 T. R. 601.

Mr. Key, *contrà*. Those cases were decided upon the ground of state policy; but in this country the decisions have been contrary; namely, that a party on a note shall not be admitted to give evidence to destroy it. *Coleman v. Wise*, 2 Johns. 165.

Mr. Ashton, in reply, contended that the witnesses were competent to show any thing subsequent to the execution of the note, that would invalidate it. He admitted the bill to be good in its execution.

The COURT (*nem. con.*) overruled the objection and admitted the testimony.

Mr. Marbury, for the defendant, then prayed the Court to instruct the jury, that if they should be of opinion, from the evidence, that the bill was drawn, accepted, and indorsed for the purpose of raising money upon it in the market, and was put into the hands of Mr. Nicholls by Mr. Hodnett, for that purpose, who procured the money from the plaintiff upon it, discounting \$25 upon \$350, the amount of the bill, which had seventy-five days to run, the transaction was usurious, and the bill void.

Which instruction the Court (MORSELL, J., *contrà*,) gave, upon the authority of the two cases cited by Mr. Marbury, namely, *Jones v. Hake*, 2 Johns. 60, and *Wilkie v. Roosevelt*, 3 Johns. 66, 206.

Verdict for the defendant. The plaintiff took a bill of exceptions to the instruction of the Court to the jury, but not to the admission of the indorsers as witnesses for the defendant. No writ of error was prosecuted. The cause stood several terms upon a motion for a new trial on the ground of misdirection of the jury, but it was never brought to a hearing, and at October term, 1821, the cause was struck off by the plaintiff.

JONES, for the use of Samuel Smoot, v. GEORGE A. SMOOT AND JOHN GOZLER.

A third person who, at the request of a contractor, executes the contract, cannot maintain an action against the contractor upon that contract.

THIS was a special action upon the case, on a written contract executed by the defendant G. A. Smoot, as principal, and the other defendant as surety, to deliver fifty cords of wood to the plaintiff, Jones. George A. Smoot being unable to comply with the contract within the time limited, Samuel Smoot, at the request of George A. Smoot and the plaintiff, Jones, without the knowledge of Gozler, delivered the wood and took an assignment of the contract; and gave George A. Smoot six months to return him the wood.

Mr. Key, for the defendant, contended that the contract was discharged by the delivery of the wood by Samuel Smoot; and that if it was not, yet the plaintiff, by giving six months indulgence to G. A. Smoot without the consent of Gozler, had discharged the latter from his liability.

The COURT (MORSELL, J., *contra*,) instructed the jury that if they should be of opinion from the evidence that the wood was delivered by Samuel Smoot to Jones, at the request of George A. Smoot, and in compliance with the contract between Jones and the defendants, the plaintiff could not recover in that action.

JONAH THOMPSON v. JOSEPH MILLIGAN.

It was not lawful, in 1812, in the District of Columbia, to sell lottery tickets, in the Potomac and Shenandoah Navigation Lottery, although the lottery was authorized by an Act of the Legislature of Maryland passed in 1809; and a note given for the purchase of such tickets, in 1812, being given for an unlawful consideration was void.

ASSUMPSIT, upon the defendant's promissory note for \$2422.50, given for the purchase of tickets in the second class of the Potomac and Shenandoah Navigation Lottery, authorized by an Act of Maryland passed in 1809.

Mr. Jones, for the defendant, contended that the sale of such tickets in this county is void as being contrary to the Act of Maryland, 1792, c. 58, adopted by the Act of Congress of 27th February, 1801, [2 Stat. at Large, 103,] as decided by this Court in *Hawkins v. Cox & Smith*, at June term, 1819, (*ante*, 173.)

The plaintiff became nonsuit. *Mr. Key*, for the plaintiff.

King v. Force.

DAVIS v. VAN ZANDT.

A promise to pay "when able," will take the case out of the statute of limitations, without proof that the defendant has since been able to pay the debt.

ASSUMPSIT, against the maker of a note.

The defendant pleaded the statute of limitations. Upon the trial the plaintiff proved that within three years, the defendant promised to pay when he should be able.

Mr. Wallach, for the defendant, contended that the plaintiff must prove that the defendant is or has been, since the promise, able to pay.

But the COURT (*nem. con.*) said it was not necessary to prove that fact to take the note out of the statute of limitations. The action is brought on the note, and not on the new promise.

(But see *Wetzel v. Bussard*, 11 Wheat. 309; *Read v. Wilkinson*, 2 Wash. C. C. Rep. 514; *Lonsdale v. Brown*, 3 Wash. C. C. Rep. 404.)

NEGRO CLARA v. THOMAS EWELL.

An old entry in a memorandum-book of a deceased person, stating the ages of the several members of the writer's family, may be given in evidence to prove the age of a witness.

To prove the age of Mrs. Storer, a witness in this cause, the defendant offered a memorandum-book in the handwriting of the Rev. Lee Massy, deceased, dated April 19th, 1777, in which he stated the names and ages of his family, who were then inoculated for the small-pox, and the different modes of treatment, and different doses of medicine for their respective ages. Mrs. Storer was then one of his family, and her name was placed in the class of those between six and ten years old.

Mr. Jones, for the plaintiff, objected to the competency of the evidence.

But the COURT (*nem. con.*) overruled the objection, and permitted the memorandum to be read to the jury.

ROBERT KING v. PETER FORCE.

On the trial of an issue from chancery to try the title to copyright, the bill and answer cannot be read in evidence to the jury, unless it be so ordered by the Court of Chancery when the issue is ordered.

King v. Force.

The omission to have the date of depositing the title of the map engraved thereon, is fatal to the plaintiff's title.

THIS was an issue from chancery, to try the complainant's title to a map of the city of Washington.

Mr. Key and *Mr. Caldwell*, offered to read the bill and answer in evidence to the jury; and stated that in the case of Peter's will, the libel and answer in the Orphans' Court had been read in evidence.

Mr. Jones, for the complainant, objected that the bill and answer cannot be read in evidence, unless it be so ordered by the Court of Chancery at the time of ordering the issue.

The COURT (*nem. con.*) refused to permit the bill and answer to be read in evidence for the defendant, it not having been so ordered at the time of directing the issue; and the jury having been sworn, it is too late now for this Court, as a Court of Chancery to make the order, as it would be a surprise upon the complainant.

Mr. Key, for the defendant, contended that the omission of the plaintiff to cause the date of the entry of the map to be engraved upon the face thereof, according to the provision of the 29th of April, 1802, was fatal to the plaintiff's title.

Mr. Jones, admitted this objection to be fatal, and the Court so instructed the jury; whereupon the following entry was made in the minutes of the Court. "*King v. Force*. Upon the trial of the issue in this case, it appearing from the face of the map, whereof the plaintiff claimed the copyright, that the plaintiff as the author and proprietor of the said map, had not caused to be impressed upon the face thereof the words denoting the date of the entry according to the Act of Congress, in strict pursuance of the first section of the Act of Congress passed on the 29th day of April, 1802, [2 Stat. at Large, 171,] entitled an act supplementary to an act entitled an act for the encouragement of learning, &c., the Court thereupon, at the motion of the defendant's counsel decided and so instructed the jury, that by reason of the said omission, the plaintiff was not entitled to claim the copyright of the map in question, or any benefit of the act to which the above-mentioned act is a supplement; whereupon the plaintiff, by protestation reserving his right to republish his said map, with a correction of the error and omission above suggested, prayed leave to dismiss his bill of injunction, and discharge the jury from any further consideration of the issue aforesaid; which is done accordingly."

 Negro Gusty v. Diggs.

MILLIGAN v. MAYNE.

A deed of land in Maryland, acknowledged by the grantor, before two justices of the peace of the county in Maryland in which the grantor then resided, not being the county in which the land laid, is not properly recorded under the act of 1766, c. 14, unless there were indorsed on the deed a certificate of the clerk of the county under the seal of the Court that the two justices were, at the time, justices of the peace of that county, and such certificate recorded with the deed.

A receipt, at the bottom of a collector's certificate of a tax-sale, to which certificate there is a subscribing witness, may be given in evidence, without proving the certificate of sale by the subscribing witness.

The receipts of the collector are not evidence upon proof of his handwriting if he be within the jurisdiction of the Court, and not a party in the cause.

TRESPASS, *quare clausum fregit*.

The COURT (THRUSTON, J., absent,) decided, under the Maryland Act of 1766, c. 14, that when a deed of land in Maryland is acknowledged before two justices of the peace in the county where the grantor resides (not being the county in which the land lies) such deed is not properly recorded, unless there were indorsed on the deed, a certificate of the clerk of the county, under the seal of the court, that the two justices were, at the time, justices of the peace of that county, and such certificate recorded with the deed.

On the trial, the plaintiff's counsel, Mr. Jones, offered in evidence a receipt signed by the defendant at the bottom of a certificate of sale signed and sealed by Joseph Bromley, collector of taxes, which receipt purported that the defendant had received from Stephen McDade, under whom the plaintiff claimed title, the amount of taxes for which the lot had been sold by Bromley to the defendant according to the terms of the sale. To the collector's certificate there was a subscribing witness, who was not present. The receipt was dated some months after the collector's certificate. The plaintiff proved the defendant's handwriting to the receipt. The Court permitted it to be given in evidence; but refused to admit the collector's receipts in evidence, upon proof of his handwriting, he himself being within the jurisdiction of the court.

 NEGRO GUSTY v. EDWARD DIGGS.

An apprentice bound in Maryland, and brought into this district, may be discharged by the Court, who will order him to be bound again by two justices of the peace, to a new master.

A NEGRO BOY, about eight years old, was brought into Court by *habeas corpus*, in the custody of Edward Diggs. It appeared that

Nicholl v. The Savannah Steam Ship Company.

he had been brought into the city of Washington from Maryland, where he had been bound to Diggs to be taught the business of a farmer. Diggs hired him here to a chimney-sweeper.

The COURT discharged him from his indentures, and ordered him to be bound out again; and for that purpose directed him to be taken, in the custody of the marshal, before R. C. Weightman and William Hewitt, Esquires, two of the justices of the peace for Washington County.

F. NICHOLL *et al.* v. THE SAVANNAH STEAM SHIP COMPANY.

An attachment under the Maryland Act of 1795, c. 56, against the property of a corporation aggregate, will be dissolved by its appearance without bail.

A ship, the property of The Savannah Steam Ship Company, incorporated under an Act of the Legislature of Georgia, was attached under the Maryland Act of 1795, c. 56, for a debt due to the plaintiff. A writ of *capias ad respondendum* was issued at the same time, commanding the marshal to take The Savannah Steam Ship Company.

Upon the return of these writs, Mr. Taney offered to appear for the defendant to the *capias*, without bail.

Mr. Jones, for the plaintiffs, objected to the appearance without bail, or security equivalent to bail, and moved the Court for judgment of condemnation against the attached effects.

Mr. Taney, for the defendant. A *capias* will not lie against a corporation aggregate. It is an invisible, intangible body. The only process against it, to compel an appearance, is summons and distress. It has a right to appear, and the Court cannot rule it to give special bail. The attachment is only to compel an appearance; and for that purpose also the act provides that a *capias ad respondendum* shall be therewith issued, and if both writs are served, the *capias* supersedes the attachment, and the attached effects are discharged; and if it be a case in which the defendant cannot, according to law, or the rules of the Court, be held to special bail, his appearance will be entered without bail.

The COURT (*nem con.*) was of opinion that the defendant had a right to appear to the *capias*, and that such appearance dissolved the attachment.

Mr. Jones, for the plaintiffs, took a bill of exceptions, which stated "that the attorney for the plaintiff, on the 7th day of July, at the session of the court which commenced on the first Monday of June, (which was the return day of the attachment,) moved

United States v. Golding.

the court for judgment of condemnation against the property and effects of this defendant attached in this cause ; and in support of the grounds alleged by the plaintiffs in their affidavit, account, and short note, upon which the attachment issued, produced and read in evidence to the Court, the depositions of H. B. P. and H. C. &c.

Whereupon *A. Toney, Esq.*, as attorney for the defendant, applied to the Court for leave to enter a common appearance by attorney for the defendant in the said suit, and without showing any cause against the condemnation, or any defence against the debt so proved as aforesaid, to dissolve the said attachment upon a mere appearance, to which the plaintiffs by their counsel objected, and insisted that the said attachment should not be dissolved, but that the Court should proceed to judgment of condemnation, notwithstanding the appearance of the defendant by attorney, as aforesaid, unless the defendant, besides offering such appearance, should make an effectual defence in the said suit, and show good cause against the condemnation prayed by the plaintiffs.

But the Court overruled the objection of the plaintiffs' counsel, and refused to proceed to a determination of the merits of the said attachment, and refused to render judgment of condemnation upon the said attachment, and ordered the said attachment to be dissolved upon a mere appearance by attorney as aforesaid ; and ordered the suit upon the *capias*, issued with the attachment, to be continued under the ordinary rules to plead, &c.

UNITED STATES v. RICHARD GOLDING.

In an indictment under the 18th section of the Act of the 30th of April, 1810, "regulating the post-office establishment," against a person employed in a department of the general post-office, charging him with embezzling letters, with which he was intrusted, and stealing therefrom sundry bank-notes, it is not necessary to aver that the letters were intended to be conveyed by post, nor to describe particularly the letters, or the bank-notes, it being averred that the particular description of the letters and of the bank-notes, was unknown to the grand jurors.

It is not a valid objection to the indictment, that the embezzlement of the letters, and stealing therefrom the bank-notes, are charged in the same count of the indictment.

THIS was an indictment under the 18th section of the Act of the 30th of April, 1810, [2 Stat. at Large, 597,] "regulating the post-office establishment." It consisted of a single count, and charged that Richard Golding on the 10th of July, 1819, "was employed in one of the departments of the general post-office, to wit, at the post-office established at Washington City in the county of Washington, as a messenger and sorter of letters, and in virtue of his said employment, was

intrusted by the postmaster of the said post-office, with sundry and great numbers of letters and packets, sent by mail to said post-office, addressed to the postmaster-general of the United States, and containing sundry and great numbers of bank-notes," &c., "belonging to the postmaster-general, and to him remitted, and by him to have been then and there received for the use of the United States; and that the said Golding, after the 30th day of April, 1810, viz., on the 10th day of July, in the year first aforesaid, with force and arms at" &c., "so being employed as such messenger and sorter of letters as aforesaid, and so being intrusted with, and having received in virtue of his said employment, at and from the said post-office at Washington, the said letters and packets so containing the said bank-notes," &c., "to be by him sorted, and duly filed, and placed in the said office, unlawfully, wilfully, injuriously, and fraudulently did secrete, embezzle, and destroy sundry and great numbers of the said letters and packets, so being addressed and directed to the postmaster-general as aforesaid, (the particular number, dates, purport, and description of the said letters and packets to the jurors aforesaid being yet unknown,) from sundry postmasters of sundry post-offices, (to the jurors aforesaid yet unknown,) and out of the said letters, unlawfully, injuriously, wilfully, and fraudulently, then and there did steal and take sundry and great numbers of bank-notes of great value, to wit, of the value of \$405, lawful money of the United States, (the particular and respective numbers, denominations, marks, and descriptions whereof, are to the jurors aforesaid, yet unknown,) belonging to the said postmaster-general, and to him remitted, and by him to have been then and there received for the use of the United States aforesaid, to the great fraud and damage of the said postmaster-general, and of the United States, to the manifest fraud, breach, and violation of the trust so reposed in him, Richard Golding, by virtue of his said employment at the said post-office, as aforesaid, to the evil example of all others in the like case offending, against the form of the statute, and Act of Congress, in such case provided, and against the peace and government of the United States."

Mr. Key and *Mr. Rodin*, for the defendant, moved in arrest of judgment; 1st, that the offence, by the statute, is embezzling letters "intended to be sent by post," but the indictment does not charge that the embezzled letters were intended to be sent by post.

2. That two offences, viz., embezzlement of the letters, and stealing the bank-notes are charged in one count.

3. That the charge of embezzling "sundry and great numbers

of the said letters and packets, and of stealing sundry and great numbers of bank-notes, is too vague and uncertain.

Mr. Jones, for the United States, *contrà*.

1. The indictment states that the letters and packets were actually sent by mail; they must therefore have been intended to be sent by post. It is not necessary that they should *not* have arrived at the place of their destination. But the charge of embezzlement is only inducement. The charge is, that having embezzled the letters and packets, he therefrom stole the bank-notes. The gist of the indictment is the stealing, not the embezzling; and the clause of the statute respecting the stealing bank-notes from letters, does not require that the letters should be sent, or intended to be sent by post; it is only necessary that they have "come to his possession."

2. It is no objection that both offences are charged in one count; one of them being charged as inducement of the other. It is the common and approved form to charge the defendant with all the offences which the statute enumerates alternatively in the same clause, and to convert *or* into *and*; as in forgery the form is, that he forged, *and* caused to be forged, &c.

3. "Sundry letters and packets," and "sundry bank-notes," is a sufficient description, when the grand jurors say that the number and particular description thereof is yet unknown to them. It is the best description they can give; and the number and particular description, are not of the essence of the offence.

The COURT overruled the motion in arrest of judgment, and sentenced the prisoner to six months' imprisonment; and by the 22d section of the Act, it is enacted that every person who shall be imprisoned by a judgment of court, under and by virtue of the 18th, 19th, 20th, or 21st sections of the Act, shall be kept at hard labor during the period of such imprisonment.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1820, AT ALEXANDRIA.

KEENE v. COOPER.

In executing a writ of inquiry in Alexandria, the plaintiff's own affidavit may be read in evidence of the amount of the damages.

On executing the writ of inquiry in this cause, *Mr. Taylor*, for the plaintiff, offered in evidence, to ascertain the amount of damages, the plaintiff's own affidavit.

Mr. Swann opposed it; and said that the practice of the Court was to allow it only in cases where the defendant does not contest the amount of damages.

Mr. Taylor, in reply. If the rule be not uniform and general, the plaintiff cannot know when he may safely execute his writ of inquiry. There is no appearance of defendant upon the record.

The COURT (*MORSELL, J., contra*.) said that the practice had been uniform in Virginia, and here, and permitted the plaintiff's affidavit to be read.

McCOBB v. LINDSAY & HILL.

A factor may retain for a general balance due from his principal.

If a factor sell in his own name, the vendee cannot set off a claim against the factor's principal, not yet payable.

ASSUMPSIT for salt sold 16th December, 1818. It was known that the salt belonged to Henop & Co., of Norfolk, it having been consigned by them, to the plaintiff, for sale. The defendants paid half in cash, and promised to pay the balance in ten days to the plaintiff. On the 16th of October, 1818, the defendants, by their factor at Norfolk, had sold flour to Henop & Co., payable on the 22d of February, 1819; and the plaintiff had, on the 28th of November, 1818, drawn a bill on Henop & Co., payable in sixty days, which they had accepted, but failed before it became payable. The defendants now claimed to set off against the

Mills v. Wilson.

plaintiff's claim for the balance due for the salt, their claim against Henop & Co. for the amount due for the flour.

Mr. Taylor, for the plaintiff.

The plaintiff has a right, at law, to maintain this suit in his own name, and has a right to retain the money, when recovered, as against Henop & Co. A factor has a right to retain for a general balance due from his principal. He has a legal right to recover, and has, at least, equal equity with the defendants.

Mr. Mason, *contra*.

It makes no difference that the debt of Henop & Co. to the defendants was not payable when the money became payable for the salt. The plaintiff acted as consignee of Henop & Co., and the defendants, having possession of the money, have a right to retain it.

Mr. Taylor, in reply.

The contract was made with the defendants, by the plaintiff, in his own right. When the money became due from the defendants to the plaintiff, the defendants had no right to retain it; and if the forms of law would then have permitted the plaintiff to obtain judgment, the defendants could not have availed themselves of the set-off.

The COURT (THRUSTON, J., absent,) was of opinion that the defendant could not set off against the plaintiff, in this action, their claim against Henop & Co.

W. N. MILLS v. WILLIAM WILSON.

Up to an attachment issued by a justice of the peace, under the Virginia Act of 26th December, 1792, § 6, in the plaintiff's claim arise, in part, upon a note of the defendant, taken up by the plaintiff, who was the indorser, the plaintiff's own affidavit is not sufficient evidence of the debt, without producing the note.

This was an attachment issued by a justice of the peace, under the Act of Virginia of the 26th of December, 1792, § 6. The plaintiff offered his own oath as to the debt, stating that it arose, in part, upon the defendant's note, which had been indorsed by the plaintiff, and by him taken up; but did not produce the note. His affidavit stated that the defendant was indebted to him in, at least, the sum of \$1,000.

The COURT (*nem. con.*) required the plaintiff to produce further evidence of his claim, not being satisfied with the affidavit.

THE MECHANICS BANK v. ADAM LYNN.

If a promissory note be made payable at the house of R. Y., the first indorser, and the notary public, on the day after the last day of grace, demand payment of R. Y., at his house, without asking for the maker, or inquiring whether he had left funds to pay the note, such demand is not sufficient to entitle the plaintiff to recover against the second indorser.

ASSUMPSIT against the second indorser of John Weightman's note to Robert Young, payable at the house of Robert Young, four months from the 25th of December, 1816.

James Millan, a notary public, testified, that on the 29th of April, 1817, (the day after the last day of grace,) he demanded payment from Robert Young, and the defendant, Adam Lynn; and believed it was at the house of Robert Young; but did not ask for John Weightman, the maker of the note, nor inquire whether he had left funds to pay it. That Weightman did not reside in the county of Alexandria, and therefore he could not demand payment from him. The other parties all resided in Alexandria.

Christopher Neale testified that the defendant requested the bank not to sue him, as, in the event of his being obliged to pay it, it would save the expense of one suit.

The COURT (*nem. con.*) instructed the jury that the evidence, so stated, was not sufficient to entitle the plaintiff to recover.

Nonsuit.

Mr. Swann, for the plaintiff. *Mr. Taylor*, for the defendant.

 THE MECHANICS BANK v. EVAN P. TAYLOR.

If a notary-public, after demanding payment from the maker of a promissory note, go to the shop of the indorser, (a coachmaker who had journeymen,) and there demand payment, but of whom he does not remember, and thinks he did not see the indorser, this is not sufficient evidence of notice, to the indorser, of non-payment by the maker.

ASSUMPSIT against the indorser of Peyton's promissory note. The notary-public demanded payment from the maker on the last day of grace, after banking hours, and afterwards, on the same day, called at the shop of the defendant, and demanded payment, but did not remember whether he saw the defendant, and thought that if he had, he should have stated it in his protest, which he did not. The defendant was a coach-maker, and em-

Sanderson v. The Columbian Insurance Company.

played journeymen. The witness did not remember of whom he made the demand.

The COURT, at the prayer of *Mr. Taylor*, for the defendant, instructed the jury that the plaintiff could not recover upon that evidence, because, as they thought, the notice was not proved.

THE UNION BANK v. COOK & CLARE.

An alteration of the date of a promissory note, whereby the time of payment is prolonged, does not make the note void as to the maker.

THIS was an action against the makers of a promissory note, payable to Francis Adams or order, dated 14th August, 1818.

The defendants offered evidence that the date was altered by the payee, from the 13th to the 14th of August, to make it fall due on the discount day of the Union Bank; and contended that the note was thereby made void.

But the COURT (THRUSTON, J., absent,) was of opinion that the alteration, prolonging the time of payment, being for the benefit of the defendants, did not make the note void as to them.

Mr. Swann, for the plaintiff. *Mr. Taylor*, for the defendant.

SANDERSON v. THE COLUMBIAN INSURANCE COMPANY.

In ascertaining whether the loss upon a policy of marine insurance amounts to five per cent., a deduction must be made of one third of the cost of the repairs, as an allowance for the difference of value between the new and the old materials.

A general usage among ship-owners and underwriters in relation to the settlement of average losses, if known to the parties, becomes part of the contract, and binds the parties.

THIS was an action upon a policy of insurance, to recover for damage exceeding five per cent. on 6000 dollars insured on the ship *Thomas*. By the terms of the policy, the underwriters were not liable for any loss or damage under five per cent. upon the amount insured.

The repairs amounted to 372 dollars, which was more than five per cent.; but if one third should be deducted for the difference of value between the new and the old materials, the loss or damage would be less than five per cent.

The plaintiff's counsel, *Mr. Hewitt* and *Mr. Swann*, contended that there should be no such deduction—or if any, not one third.

Mr. Jones, for the defendants, cited "The Shipmaster's Assistant and Owner's Manual," pp. 130, 136.

The COURT (THRUSTON, J., absent,) decided that on settlement of a partial average the difference in value between the new and the old materials ought to be deducted, whether the deduction reduce the sum below the five per cent. or not.

Mr. Nichols, a witness sworn on the part of the defendants, testified, that he has been an insurance broker twenty-three years. That the universal practice, as far as he knows and believes, is to deduct one third for the difference in value between the new and the old materials, whether they were half worn, or three fourths worn, or quite new. That sometimes the insured gains, and sometimes loses, by the rule.

The COURT further instructed the jury that if they should be satisfied by the evidence, that the practice, as stated by *Mr. Nichols*, was the general usage, in settlement of average losses, among ship-owners and underwriters, and that the usage was known to the plaintiff at the time of the contract, it was to be considered as part of the contract, and the plaintiff was bound by it.

Mr. Swann, asked whether the opinion was the same, whether the materials, used in the repair, were new or old.

The COURT, said it would be time enough to answer that question when a case should occur.

GRAY v. REARDON.

If the defendant sell personal property as the agent and by the authority of the plaintiff, and agree to pay him the proceeds, he is liable to the plaintiff for the proceeds of the sale, although other persons may have been jointly interested with the plaintiff in the property.

ASSUMPSIT, for money had and received to the plaintiff's use.

The plaintiff, being in possession of some slaves, empowered the defendant to sell them for him and to pay him the proceeds of the sale. The defendant sold them and received the money, but refused to pay it to the plaintiff, because he alleged that the slaves were the property of one Manly Reardon, who died intestate, and that the title was in his administrator.

The plaintiff claimed the slaves in right of his wife, who was the mother and heir at law of Manly Reardon.

The defendant contended, that Manly Reardon left brothers and sisters who are co-heirs with the mother.

Mr. Mason, for the plaintiff, contended that as the defendant

 Negro Reeler v. Robinson.

acted solely as the agent of the plaintiff who was in possession, and derived his whole authority from the plaintiff, he was bound to pay over the money to him, although others may have had a joint interest in the slaves.

The Court (*nem. con.*) upon the prayer of the plaintiff's counsel, instructed the jury that if they should believe from the evidence, that the defendant, in making the sale, acted as the agent and by the authority of the plaintiff, and agreed to pay the plaintiff the proceeds, he is liable to the plaintiff in this action, although the jury should be satisfied by the evidence, that other persons were jointly interested with him in the slaves.

CHARLES L. SEARS v. PATRICK NOON.

An attachment, by a justice of the peace, under the sixth section of the Virginia Act of 26th of December, 1792, can only be issued by a justice of the county in which the defendant resides, or from which he is privately removing, or in which he absconds, or conceals himself.

Mr. Wise, for the defendant, moved the Court to quash the warrant of attachment, which recited as follows: "County of Alexandria, ss. Whereas, Charles L. Sears, of the city of Washington, in the District of Columbia, hath this day complained before me, the subscriber, one of the United States' justices of the peace for the county aforesaid, that Patrick Noon of the city of Washington aforesaid, is indebted to him in the sum of nine thousand dollars current money, and that the said Patrick Noon hath privately removed himself out of this county, or so absconds or conceals himself that the ordinary process of law cannot be served on him; these are therefore," &c.

The Court (*nem. con.*) quashed the attachment, with costs.

NEGRO SAMUEL REELER v. MATTHEW ROBINSON.

The lapse of nine years since the plaintiff arrived at the age of twenty-one years, does not create a presumption that the oath was taken by the person who brought the plaintiff into Virginia.

This was a suit in Alexandria for freedom, grounded upon an importation, twenty-four years ago, from Maryland, without the importer's taking the oath required by the Virginia law.

Mr. Taylor, for the defendant, contended that from the lapse of time, a presumption arises that the oath was taken. The law

Swann v. Bowie.

did not require that the oath should be reduced to writing, nor certified, nor recorded.

Mr. Hewitt, for the plaintiff, *contra*.

The plaintiff was only six years old when imported. No presumption could begin to arise against him until he was of full age, and able to sue in his own name and right. Deduct fifteen years from the twenty-four, and there remain only nine years, in which he has been competent to sue for his freedom. This neglect or forbearance to assert his right is no bar to his title.

Mr. Taylor, in reply. The Act of Virginia authorizes infants to sue by a justice of the peace, who, upon complaint made, is bound to sue. There has been no actual disability since he came to years of discretion.

The COURT, (THRUSTON, J., absent,) decided that the presumption did not arise under those circumstances.

THOMAS SWANN v. DAVIS BOWIE.

In cases of tort, courts have seldom granted new trials on the ground of excessive damages, unless they were so excessive as to imply gross partiality, or corruption, on the part of the jury.

Upon a special verdict in an action of trespass for killing the plaintiff's dog by a constable who justifies under the by-law of the corporation of Alexandria, of the 28th of April, 1811, the Court cannot render judgment for the defendant, unless the jury expressly find that the dog was "found going at large within the limits of the corporation without his owner."

TRESPASS, that the defendant on the — day of June, 1819, at the county aforesaid, with force and arms, that is to say with a gun loaded with powder and lead, did break and enter the close of the plaintiff, and did then and there shoot into the garden of the plaintiff, and did then and there kill the dog of the plaintiff of the value of one hundred dollars and other wrongs did, &c.; damage, \$500. The defendant pleaded not guilty, with leave to give special matter of justification in evidence.

The jury found a special verdict, stating that on the 15th of June, 1819, the plaintiff was owner of a dog, named Beaver; that the plaintiff resided and kept the said dog in the town of Alexandria, and within the limits of the jurisdiction of the common council of said town; that on that day the defendant was a constable duly appointed. They found also the charter of the said town of 1779; the Act of Congress of the 25th of February, 1804, [2 Stat. at Large, 255,] to amend the charter, and the several by-laws of the corporation authorizing the killing of dogs; by one of which, passed on the 28th of April, 1811, it was enacted, "That it shall be lawful for any person, and shall par-

ticularly be the duty of the constable, to kill and destroy any dog found going at large within the limits of the corporation without his owner, between the first day of April, in each year, and the first day of October." That on the said 15th day of June, the plaintiff's said dog then being found upon the foot pavement in one of the public streets of the town of Alexandria, within the jurisdiction of the common council, was shot by the defendant and killed. That the said dog, at the time he was shot and killed, and for a long time before regularly watched in the plaintiff's stable, and attended upon the hostler; and had been in the regular habit of walking from the said stable, which fronted on the street, along the foot pavement, and by the side of the plaintiff's garden paling, through a gate into the plaintiff's yard and kitchen; and that there was no other path or open access from the said stable into the plaintiff's yard; that the said stable is about 120 feet distant from the said gate, which opens through the paling into the yard on the same side of the street with the stable, and is the nearest open access from the stable into the said yard and kitchen; that the dog was uncommonly domestic and harmless in his disposition, and in good health and condition at the time of being shot and killed as aforesaid, and was at that time peaceably pursuing his accustomed and daily route, before sunrise in the morning, from the said stable along the paved footway in the street, and close along the plaintiff's said garden-paling, to the said gate; and was there shot and killed aforesaid; that the defendant at the time of discharging the gun by which he so shot and killed the said dog, placed himself in such a position, and so pointed his gun that the shot from the same would necessarily and obviously strike against the plaintiff's said garden-paling, and did in fact so strike against the said palings and penetrate through the same into the said garden: that the said foot-pavement, whereon the said dog was shot as aforesaid is a part of the public street, but is separated from the public carriage-way and horse-way, by a curbstone, and is paved with brick for the accommodation of foot passengers; and that the whole expense of making the said foot-pavement, and laying such curbstone, along the whole front of the plaintiff's lot, was, pursuant to the by-laws and regulations of the said corporation, paid by the plaintiff.

"If upon the matter found as aforesaid the Court shall be of opinion that the defendant was not, in law, justified in shooting the said dog, in the circumstances aforesaid, then we find for the plaintiff and assess his damages to the sum of two hundred and seventy-five dollars. And if the defendant was justified, in law, in so shooting and killing the said dog; but is liable to the plain-

tiff, in this action, for shooting into his fence and garden, we find for the plaintiff and assess his damages, for the last-mentioned act, to the sum of two hundred dollars; and if the law be for the defendant on both of the grounds of action stated in the declaration, and before mentioned, then we find for the defendant."

Mr. Taylor, for the defendant, moved for a new trial, on the ground of the damages being excessive.

Mr. Fendall and *Mr. Swann*, *contrà*, cited *Duberley v. Gunning*, 4 T. R. 651; *Beardmore v. Carrington*, 2 Wilson, 249; 9 John. 52; Tidd, 93, 818.

In the argument upon the special verdict, it was contended by the plaintiff's counsel that the corporation had no authority to make the by-law of the 28th of April, 1811; and that, if they had, and if the defendant had a lawful right to kill the dog, yet the manner of doing it was unlawful and made the defendant a trespasser *ab initio*.

CRANCH, C. J., delivered the opinion of the Court.

A motion has been made, in this cause, for a new trial on the ground of excessive damages.

In cases of tort, courts have seldom granted new trials unless the damages are so excessive as to imply gross partiality or corruption on the part of the jury. This is not a case of that kind; and although the Court should think the damages unreasonable, (which however we do not say,) yet we should not be justified by precedent in setting aside the verdict on that ground.

In the argument upon the special verdict, it has been contended,

1st. That the corporation of Alexandria had no authority to make the by-law under which the defendant attempts to justify the act.

2d. That if they had, the justification under that by-law is not made out in point of fact; that is to say, it does not appear, by the special verdict, that the dog was "found going at large, within the limits of the corporation, without his owner;" and

3d. That if the dog was in a situation in which he might be lawfully killed by the defendant, yet the manner and means of killing, were unlawful, and therefore the defendant must be considered, in law, a trespasser *ab initio*.

As the opinion of the Court upon the second point is in favor of the plaintiff, it will be unnecessary to decide the other two.

The special verdict does not find that the dog had not such a collar as is required by the by-law of the 24th of September, 1804; so that the defendant cannot justify under that law. The only by-law under which he can claim a justification is that of the 28th of April, 1811, which enacts, "That it shall be lawful

for any person, and shall particularly be the duty of the constables to kill and destroy any dog going at large, within the limits of the corporation, without his owner, between the first day of April, in each year, and the first day of October."

The special verdict does not find that the dog was "found going at large without his owner." We do not suppose it necessary that the jury should have found the fact in so many words, but in order to justify the defendant they must have found facts which, in law, amount to the same thing. They find only that the dog, "being found upon the foot-pavement in one of the public streets of the town," "was shot by the defendant and killed," "and that he was, at the time of his being so shot and killed, peaceably pursuing his accustomed and daily route from the said stable along the paved footway in the street, and close along the plaintiff's said garden-paling to the said gate."

All this may be true, and yet the dog might not be going at large without his master. He might have been led by a string by a servant, or he might have been with his master. The Court can infer no fact from the facts found; and the facts found do not amount, in law, to the facts required by the by-law in order to justify the defendant.

As this view of the case seems to be very clear and decisive of the cause, we abstain from giving any opinion upon the other points made in the argument.

JUDGMENT. The COURT, having heard the arguments of counsel upon the special verdict found in this cause, and the same being considered, the Court is of opinion, that inasmuch as the jury have not found that the dog in the declaration mentioned, was, at the time of the defendant's killing him, found going at large without his master, within the meaning of the by-law of the 28th of April, 1811, in the said special verdict recited, the defendant was not, in law, justified in shooting and killing the said dog, in the circumstances stated in the said special verdict. Whereupon it is considered by the court that the plaintiff recover of the defendant the sum of 275 dollars so as aforesaid assessed by the jury as his damages, and for his costs about his suit in this behalf expended.

COMMON COUNCIL OF ALEXANDRIA v. JOSEPH MANDEVILLE.

It is not necessary that an order of the Common Council for the pavement of any particular street, should be passed as a by-law, and submitted to the Mayor for his approbation.

Upon a motion for judgment against a proprietor of lots, liable for the expense of

Common Council of Alexandria v. Mandeville.

paving the street opposite the lots, the Court will not receive evidence that the pavement was badly done.

THIS was a motion by *Mr. Taylor*, Attorney for the Common Council of Alexandria, for judgment against Joseph Mandeville, for his proportion of the expense of paving Pitt street, between Cameron and Queen streets, the recovery of which, by motion, is authorized by the amended charter of the 25th of February, 1804, § 11, [2 Stat. at Large, 255.]

By the by-law of the 7th of September, 1802, the proprietor of a lot is liable to a tax of \$1.32, on every front foot of his lot on a street sixty-six feet wide, which should thereafter be ordered by the council to be paved. The street in question had been ordered to be paved, the tax had been demanded, and payment refused, and due notice given of the present motion.

Mr. Swann, for the defendant, offered to prove that the order for the paving of Pitt street, between Cameron and Queen streets, was not passed as a by-law after three readings, agreeably to the rules adopted by the Common Council.

The COURT (THRUSTON, J., absent,) refused to permit such evidence to be given, deeming it irrelevant and immaterial.

He also offered evidence that the pavement was badly done.

But the Court rejected the evidence; and in the case of the *Common Council v. Swann*, at the same term, decided (THRUSTON, J., absent,) that it was only competent for the defendant to show that the contract made by the Common Council for the pavement was not fairly made, or fraudulent, or not with good faith.

Judgment for the plaintiff.

CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1821, AT WASHINGTON.

CRAWFORD v. MILLIGAN.

If a note fall due on Saturday, and payment be demanded of the maker on that day, notice to the indorser, on Monday, is not too late.

ASSUMPSIT against the indorser of a promissory note, which became due on Saturday. Payment was demanded of the maker of the note on that day, and notice of the non-payment by the maker was given to the defendant on the following Monday.

The COURT (*nem. con.*) decided that the notice was not too late.

WATERS v. J. R. BUSSARD and DANIEL BUSSARD.

A debt due by the plaintiff to one of two joint defendants, cannot be set off against the joint debt to the plaintiff.

DEBT upon a sealed bill. Plea, payment, and an account in bar.

The defendants offered to set off an account of J. R. Bussard against the plaintiff for medical services.

The COURT (CRANCH, C. J., doubting,) refused to allow the account to be given in evidence.

Mr. Caldwell, for the plaintiff.

Mr. H. H. Chapman, for the defendants.

SMITH v. WOODWARD & YERBY.

If the writ be issued against two defendants, and one only be taken on the first writ, and the other be afterwards taken on an *alias* or *pluries*, the cause against the defendant first taken will be consolidated with that against the other defendant, although there may have been the intermission of a term between the issue of the first and second or other writ.

THE first writ issued against Woodward & Yerby in 1818.

Woodward only was taken. The writ was not renewed against Yerby until several terms after, when a writ was issued against him, upon which he was taken.

Mr. Law, for the plaintiff, moved the Court to consolidate the suit against Woodward with that against Yerby.

Mr. Taney, for the defendant, objected that the writ against Yerby had not been regularly continued. The object of the plaintiff is to avoid the plea of limitation. The docket, however, showed the connection, and the proceedings were ordered to be consolidated into one cause.

HALLER v. BEALL.

After issue joined in replevin, it is too late to move to quash the writ.

Semble, that the Act of Maryland, which requires two sureties in replevin bonds is directory only, and that the writ is not void, if there be only one surety.

Mr. Marbury, for the defendant, after issue joined, and the jury was about to be sworn, moved the Court to quash the writ of replevin, because the clerk had taken the bond with one surety only. The statute of 11 Geo. 2, c. 19, § 23, requires two sureties in all cases of replevin of goods distrained for rent; and the Act of Maryland of 1790, c. 53, § 12, provides that "before any clerk shall issue a writ of replevin in virtue of this act, the plaintiff or plaintiffs shall enter into bond, with two sufficient sureties, in double the value of the property, to be replevied in the same manner as in other cases of replevin." And such has always been the practice in the Courts of Maryland, as well as in this Court.

The Court said it was now too late to move to quash the writ; and that they were inclined to think that the statute of Maryland was directory only, and that the writ was not void merely on that account. (See the case of *Orr v. Ingle*, December, 1819, *ante*, 193.)

MCCORMICK'S LESSEE v. MAGRUDER.

In ejectment, if the clerk by mistake omit to enter the tenant's appearance at the first term, and judgment be entered against the casual ejector, and a *habere facias* be issued, the Court will, at a subsequent term, upon affidavits, quash the *habere facias*, and rescind the judgment, and permit the tenant to appear, upon entering into the common rule.

In ejectment there had been judgment at December term, 1819,

against the casual ejector by default, and a *habere facias* issued returnable to this term.

Mr. Toney, for the tenant, moved the Court to quash the execution, and rescind the judgment, and permit the tenant to appear, upon entering into the common rule.

This motion was founded upon affidavits that Mr. Marbury ordered the clerk to enter his appearance for the tenant before the judgment was entered, but the clerk, by mistake, entered it in another case.

Mr. Wallach and Mr. Jones, for the plaintiff, mentioned the case of Glover; (and see also *Sherburne v. King & Langley*, at June term, 1820, *ante*, 205, and *Jones v. Llewellyn*, at March term, 1820, and December term, 1819.)

The Court, upon the affidavits and motion, quashed the *habere facias*, rescinded the judgment, and permitted the tenant to appear.

EDMONDSON v. BARRELL.

A deposition, taken under the Act of Congress, must be reduced to writing by the magistrate, or by the deponent in the presence of the magistrate.

If the declaration be against three jointly, upon a joint *assumpsit*, and one of them only be taken, who pleads *non assumpsit* for himself alone, and a verdict be rendered for the plaintiff, the judgment will be arrested, unless the other joint defendants shall have appeared, or process shall have been issued and continued against them up to the time of the trial.

The Court will not quash the writ, because it is against one only of three joint defendants, against whom the plaintiff has declared.

The Court will not receive a plea in abatement that there are other defendants not taken, unless it be first put in upon oath.

A partnership debt may be given in evidence to support a several *assumpsit* by one of the partners.

If, at the trial, all objections are waived to a deposition, and a new trial be granted, the Court will not suffer objections to be made to the same deposition upon the new trial.

If a magistrate who takes a deposition under the Act of Congress, certifies that the deponent was "carefully examined and cautioned and sworn to speak the whole truth," it is to be inferred that he was so examined, and cautioned and sworn by the magistrate who took the deposition.

If goods be consigned by the plaintiff to K. & G. for sale, and be sold by them, and the proceeds of sale received by them; and afterwards B. becomes a partner with K. & G. under the name and firm of K. G. & Co., the new firm is not liable to the plaintiff for the proceeds of the sales of those goods, unless they came to the use of the new firm, who in consideration thereof promised to pay the same to the plaintiff.

This was an action of *assumpsit* for goods sold and delivered, money had and received, &c.

The writ was against "George G. Barrell, late of the county aforesaid, merchant, lately carrying on trade and commerce, as a merchant, under the firm of Kirkpatrick, Grivegneè & Co."

Edmondson v. Barrell.

The declaration stated, that "William Kirkpatrick, Henry Grivegneè, Jr. and George G. Barrell, lately trading under the firm of Kirkpatrick, Grivegneè & Co., were attached to answer to Charles Edmondston;" who, by *E. J. Lee*, his attorney, complained, "That whereas the said defendants on the 30th of April, 1816, at Malaga, to wit, at the county aforesaid, were indebted to the plaintiff in the sum of \$2,556.55, for sundry matters and articles properly chargeable in an account, as by a particular account thereof herewith into Court exhibited, appears," &c., and being so indebted, the said defendants, in consideration thereof, promised to pay, &c. There were also the common money counts, all averring a joint liability, and a joint promise to pay.

The defendant, George G. Barrell, only having appeared, pleaded *non assumpsit* for himself alone, upon which issue was joined, and the cause came to trial at June term, 1819.

Mr. E. J. Lee, for the plaintiff, offered to read in evidence, to prove the handwriting of the defendant Barrell, in a letter to the plaintiff, the deposition of John Marshall, of Charleston, South Carolina, taken before the Hon. John Drayton, District Judge of the United States, who certified as follows. "District of South Carolina, ss. On this, 28th day of May, 1818, personally appeareth the under-named deponent, John Marshall, of Charleston, merchant, before me, the subscriber, John Drayton, District Judge of the district aforesaid, and being by me carefully examined, cautioned, and sworn in due form of law, to testify the whole truth and nothing but the truth, relating to a certain civil cause wherein Charles Edmondston is plaintiff, and Kirkpatrick, Grivegneè, & Co. are defendants, now depending," &c., "he maketh oath to the deposition above written, and subscribes the same in my presence, the said deposition being first reduced to writing by the deponent."

Mr. Lear, for the defendant, objected that the judge had not certified that it was so reduced to writing *in his presence*, as required by the 30th section of the Judiciary Act of 1789. [1 Stat. at Large, 73.]

Mr. E. J. Lee contended that it must be presumed to have been so written, as the law required it.

But the Court (*nem. con.*) supported the objection, and rejected the deposition.

The handwriting of the defendant, Barrell, was proved by another witness, and the jury found a verdict for the plaintiff.

Mr. Lear, for the defendant, Barrell, moved, in arrest of judgment, that the declaration is against three persons, upon a joint assumpsit, and the verdict finds the issue only as to one of them, the others not having appeared, nor having been outlawed, and

no process having been issued against them. The practice of outlawry, in Maryland, in civil cases, has become obsolete, but, as a substitute for it, process must be issued against all the defendants, and continued against those not taken, to the time of trial, when, if not taken, that fact may be stated in an amendment to the declaration, and the plaintiff may obtain judgment against such of the defendants as have appeared and pleaded.

Mr. Lee and *Mr. Jones*, for the plaintiff, contended that the objection came too late. That a variance between the writ and the declaration can only be taken advantage of by plea. That the writ is no part of the record without being made so by oyer, which the defendant has not demanded. *Hole v. Finch*, 2 Wilson, 394, 395; 1 Saunders, 317, note 3; *Ford v. Burnham*, Barnes, 340; *Spalding v. Mure et al.* 6 T. R. 363; *Watson v. Shaw*, 2 T. R. 654; *Oakley v. Giles*, 3 East, 167; *Clarke v. Holmes*, 3 Johnson, 148, 588; *Stables v. Ashley*, 1 B. & P. 49; *Stephens v. White*, 2 Wash. 212; *Boswell v. Jones*, 1 Wash. 323; *Barton v. Petit & Bayard*, 7 Cranch, 194; *Moss v. Moss*, 4 Hen. & Mun. 293; 1 Tidd, 160, 162, 652; *Tomlinson v. Blacksmith*, 7 T. R. 132; *Arthur Blackmore's case*, 8 Co. 161; *Tomkin v. Crocker*, 1 Ld. Ray. 564; S. C. 1 Salk. 49; Barnes, 10, 16, 22; 1 Tidd, 162; Judiciary Act of 1789, § 32. [1 Sat. at Large, 73.]

Mr. Lear, *contra*, cited *Barton v. Petit & Bayard*, 7 Cranch, 194; *Rice v. Shute*, 5 Burr. 2613; 1 Chitty on Pleading, 438, 439; *Scott v. Godwin*, 1 B. & P. 72; 1 Chitty, 29; 1 Harris's Entries, 201, where there is the form of a declaration against one defendant, when the others are returned *non sunt*.

The Court arrested the judgment, and ordered a *venire de novo*, and permitted the plaintiff to amend his declaration upon payment of the costs of the term.

At April term, 1820, *Mr. Lear*, for the defendant, moved the Court to quash the writ, because it had been issued against the defendant Barrell, alone, upon a joint cause of action.

But the Court overruled the motion.

The plaintiff, under the leave to amend, filed a new declaration stating — "That George G. Barrell, late of the county aforesaid, merchant, and lately carrying on trade and commerce as a merchant, under the name, style, firm, and description of Kirkpatrick, Grivegneè, & Co., was attached to answer unto Charles Edmondston, in a plea of trespass on the case, &c., and whereupon the said Charles, by E. J. Lee, his attorney, complains, that whereas the said George, on the 5th day of May, 1816, at the city of Malaga, in the kingdom of Spain, to wit, at the county aforesaid, together with one William Kirkpatrick, and Henry Grivegneè the younger, was indebted to the said plaintiff in the

sum of 2556 dollars and 55 cents, lawful money of the United States, for divers goods, wares, and merchandises by the said plaintiff, before that time sold and delivered to the said George, and to the said William Kirkpatrick and Henry Grivegneè the younger, at their special instance and request; they, the said George, William, and Henry, to whom the said goods, wares, and merchandises were sold and delivered as aforesaid, being, at the time of the said goods, wares, and merchandises, and of contracting the said debt as aforesaid, to wit, on the same day and year aforesaid, and for a long time before and after, at Malaga aforesaid, joint merchants and traders, carrying on trade and commerce in copartnery, under the name, style, firm, and description of Kirkpatrick, Grivegneè, & Co. — which said William and Henry, as well at the time of the sale and delivery of the said goods, wares, and merchandises, and of contracting the said debt as aforesaid, as at the time of commencing the plaintiff's action aforesaid, and always before, and ever since, continually dwelt and resided in foreign parts, without the District of Columbia aforesaid, and without the limits and jurisdiction of the United States of America, to wit, at Malaga aforesaid, and were not, nor was either of them, at the time of commencing the plaintiff's action as aforesaid, nor at any time before or since, any where within the jurisdiction of this court; and being so indebted, the said George, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, undertook," &c., "and to the plaintiff faithfully promised to pay him the said sum of money when he, the said George, should thereunto be afterwards requested."

There was also a count for money had and received, with similar averments.

And the declaration concluded with an averment that neither the said George, nor the said William and Henry have paid the said sums of money, or either of them, or any part thereof; and that the said defendant and the said William and the said Henry have altogether refused to pay the same, &c.¹

Mr. Lear, for the defendant, offered a plea in abatement, that the other joint promisors had not appeared, and were not made parties to the suit.

But the COURT (*nem. con.*) refused to receive it unless upon oath.

The defendant then pleaded the general issue, and the jury was sworn.

The plaintiff offered, in evidence, the letters of Kirkpatrick,

¹ This declaration was drawn by Walter Jones. Esq.

Grivegnè, & Co., in the handwriting of the defendant Barrell, dated Malaga, 17th April, and 8th May, 1816, inclosing an account of sales of the plaintiff's rice to the amount of \$3,880.10, and promising, when in cash, to remit the amount in undoubted bill, on London, to Davidson & Simpson, according to the plaintiff's orders; which was the whole evidence in the cause.

Whereupon the defendant's counsel moved the Court to instruct the jury that the said evidence was not sufficient, in law, to enable the plaintiff to sustain his action; and

The COURT (*nem. con.*) so instructed them; being of opinion, that to enable the plaintiff to sustain this action against the defendant alone, upon his sole *assumpsit*, it was necessary for the plaintiff to prove an express sole promise by this defendant, upon the joint consideration; and that the sale and delivery of goods to the three, would not, in law, raise an implied *assumpsit* of one alone.

The plaintiff took a bill of exceptions.

The jury found a verdict for the defendant.

Mr. Lee, for the plaintiff, moved for a new trial, on the ground of the misdirection of the jury, by the Court, in the point of law, and cited *Rice v. Shute*, 5 Burr. 2611; *Abbot v. Smith*, 2 W. Bl. 947; *Whelpdale's case*, 5 Co. 119; *Stead v. Moone*, Cro. Jac. 152. See also, *Shirreff v. Wilks et al.* 1 East, 48; *Nowlan v. Geddes*, 1 East, 634; *Tom v. Goodrich*, 2 Johnson, 220; *Brown v. Belches*, 1 Wash. 9; *Shields v. Oney*, 5 Munf. 550; *Watson* on Part. 241.

Mr. Jones, on the same side. Mercantile partners are jointly and severally bound, but not other joint contractors. A joint contractor, if sued alone, may rely on the joint contract, and may object to the evidence; for the plaintiff's *allegata* and *probata* must agree. It is only in mercantile partnerships that the plaintiff can recover in a suit against one alone, upon a partnership debt, if the defendant do not plead in abatement. In this cause the declaration presents the same case as if the writ had issued against all the partners, and all but one had been returned *non est*.

The COURT (THRUSTON, J., *contrà*,) granted a new trial, being of opinion that a partnership debt may be given in evidence to support the *assumpsit* laid in the declaration.

At April term, 1821, the cause came on again for trial, upon the issue of *non assumpsit*.

Mr. Lear, for the defendant, objected to the deposition of J. Marshall, for want of formality; but

The COURT overruled the objection, because he had, at the former trial, waived all objections to it.

Mr. Lear, for the defendant, also objected to the deposition of

John Haslett, because the judge who took the same had not *expressly* certified that the deponent was examined, cautioned, and sworn *by him*, the said judge; he having certified that "the said witness, being of full age, and being carefully examined, and cautioned, and sworn to speak the whole truth, says in manner and form following," &c.

But the COURT overruled that objection also, and suffered the said deposition to be read in evidence, because it was plainly to be understood that the deponent was *by him* (the judge) examined and cautioned, &c.

Mr. Lear then prayed the Court to instruct the jury, that if they should be satisfied by the evidence, that the goods of the plaintiff, for the value of which this suit is brought, came to the hands of the said Kirkpatrick and Grivegneè, and were sold by them before the admission of the defendant into the partnership, then the contract was made with the plaintiff by Kirkpatrick and Grivegneè only, and the defendant is not chargeable in this action; and that if the defendant was not a partner of the firm at the time of the contract, no subsequent *assumpsit* by him, in the name of the firm can charge him, in this action, unless an agreement be proved that he should be chargeable with the debts or contracts of the old firm;

Which instruction the COURT refused to give, as prayed, but instructed the jury, that if they believe from the evidence that the goods of the plaintiff in the declaration mentioned, came to the hands of Kirkpatrick and Grivegneè, and were sold by them before the defendant, Barrell, was admitted into the partnership, then the contract was made by the plaintiff with Kirkpatrick and Grivegneè only, and the defendant is not chargeable in this action, unless the jury should be satisfied by the evidence that the stock of the old firm was carried into the new, and that it was agreed by the new firm with the plaintiff to pay the said debt to him; or that the money for which the said goods were sold, came to the hands of the new firm of Kirkpatrick, Grivegneè & Co., and that in consideration thereof, they promised to pay the amount thereof to the plaintiff.

Verdict for the plaintiff, \$2,556.55, with interest from the 16th of June, 1816.

The defendant took a bill of exceptions, but did not prosecute a writ of error.

SMITH v. MIDDLETON.

A *supersedeas* judgment is absolutely void, unless acknowledged by the original defendant and two sureties.

THIS was a motion to quash a *ca. sa.* issued against Mid-

 King v. Simm.

dleton alone, upon a *supersedeas* judgment against Alexander McCormick, and the defendant Middleton. The judgment was confessed by McCormick with only one surety, whereas the Act of Maryland of 1791, c. 67, requires that the judgment should be confessed by the principal and two other persons.

Mr. Key, for the defendant, contended that the *supersedeas* judgment was a mere nullity. It was a special jurisdiction given to a magistrate out of court, and must be strictly conformable to the power given by the statute, or it is absolutely void.

Mr. Taney, contra. The statute requiring two sureties was for the benefit of the plaintiff, and he alone has a right to complain, if only one be taken. The principal debtor has had the full benefit of the *supersedeas*, and the plaintiff has waived the error.

The COURT (*nem. con.*) stopped *Mr. Key* in reply, and said that the *supersedeas* judgment was absolutely void.

Ca. sa. quashed.

 TRAVERS v. APPLER.

A baker, using tallies with his customers for the purpose of keeping an account of the number of loaves of bread delivered, may call upon the defendant to produce his counterpart; if a proper foundation be laid for such a call, by affidavit of the plaintiff that such tallies were kept with the defendant, and that he had a counterpart; and if the defendant will not produce it, and will not make oath that he had it not, the plaintiff may produce his counterpart in evidence to the jury.

ASSUMPSIT, for bread sold and delivered.

The plaintiff had given notice to the defendant to produce the counterpart of his tallies.

The COURT was of opinion that if the plaintiff would lay a foundation for his call upon the defendant, by affidavit that such tallies were kept by the defendant, and if the defendant would not produce them, nor make oath that he had not such tallies, the plaintiff might produce them in evidence.

 C. B. KING v. THOMAS SIMM, bail of R. H. Love.

If the principal be discharged under the insolvent law of one of the States after the judgment against him in this Court, and the motion to discharge the bail be made at the return term of the *scire facias* against the bail, the Court will discharge him, upon payment of the costs of the *scire facias*.

The *scire facias* against Thomas Simm, special bail of Richard H. Love, was returned at December term, 1820, at which term the motion was made to exonerate the bail, on the ground that

 Woodward v. Hall.

the principal has been discharged under the insolvent law of Virginia, since the judgment rendered against him in this Court.

Mr. Randall, for the defendant.

Mr. Turner, for the plaintiff, cited the following cases in this Court, viz.: *Boyer v. Herty*, in July, 1805, (1 Cranch, C. C. 251); *Byrne v. Carpenter*, June term, 1808, (1 Cranch, C. C. 481); *Bussard v. Warner*, at June term, 1815, [*ante*, 111.] And also *Woolley v. Cobbe*, 1 Burr. 244; *Cockerill v. Owston*, 1 Burr. 486; Harris's Entries, Plea of insolvency of the principal; 1 Saund. 2, 61; *Walker v. Giblett*, 2 W. Bl. 811; *Donnelly v. Dunn*, 1 B. & P. 448; S. C. 2 B. & P. 45; *Martin v. O'Harra*, Cowp. 823; *Southcole v. Braithwaite*, 1 T. R. 624.

The COURT (*nem. con.*) ordered the *exoneretur* to be entered, on payment of the costs of the *scire facias*. The Court at a former term had decided the same point in the case of Robert Bayley.

 ROBERTS, for the use of QUANTRILL, v. REINTZELL.

If the plaintiff reside out of the district, and the person for whose use the suit is entered upon the docket remove from the district, the Court will order the plaintiff to give security for the costs.

WHEN this suit was brought for the use of Quantrill, he resided in this district, but having afterwards removed from the district, and plaintiff being a non-resident,

Mr. Key, for the defendant, moved the Court for a rule on the plaintiff to give security for the costs.

Mr. Jones, for the plaintiff, objected.

But the COURT granted the rule.

 WOODWARD v. HALL.

The magistrate who takes a deposition under the Act of Congress, must certify the reasons of its being taken.

The amount of the costs of a suit in New York may be proved by parol.

THIS was a suit brought to recover the amount of costs in an action in New York, for which the defendant had agreed to be responsible.

Mr. Law, for the plaintiff, offered the deposition of Richard Riker, prothonotary of the court in New York, stating the amount of the costs taxed, and a copy of the bill of costs as taxed.

Negro Jack Garretson v. Lingan.

Mr. Jones, for the defendant, objected that the judge who took the deposition, had not certified the reasons of its being taken.

Mr. Law, contra. The judge certifies that the deponent is of New York, and a counsellor at law, and that the deposition was taken at New York. The fact thus appears that the deponent resided more than one hundred miles from the place of trial, which is a good reason for taking the deposition.

The COURT (THURSTON, J., absent,) decided that the certificate was not sufficient, and for that reason rejected the deposition.

But it was afterwards read, by consent, subject to the question as to the competency of the matter thereof.

Mr. Jones, for the defendant, objected that the existence of the suit in New York, and the amount of the costs taxed, were matter of record, and could only be proved by an exemplification of the record; so also that the plaintiff was attorney in the cause. This is not a suit for the attorney's fees only, but for costs paid by the attorney.

Mr. Law, contra. The defendant, by his letter to the plaintiff, admits the existence of the suit in New York, which is equivalent to record evidence. Mr. Riker is the officer whose duty it was to tax the costs. When a cause is settled by the parties as this was, it is not necessary or usual to tax the costs.

The COURT (*nem. con.*) was of opinion, that the parol evidence was competent to prove the bill of costs.

 NEGRO JACK GARRETSON v. LINGAN.

Length of time does not raise a presumption against a slave, that his owner took the oath required by law.

PETITION for freedom. The petitioner was carried, by his owner, from Maryland to Virginia, in the year 1784, and kept there several years, and then brought back to Maryland. By the law of Virginia of 17th of December, 1792, p. 186, the slave was entitled to his freedom, unless the owner took a certain oath within sixty days after his removal to Virginia.

Mr. Key and *Mr. Caldwell*, for the defendant, moved the Court to instruct the jury, that after such a lapse of time they have a right to presume that the oath was duly taken agreeably to law. The law did not require that there should be any record of the taking of the oath. It is a fact which may be proved by parol. Judge White in Virginia has decided in favor of the presumption.

 Smith & Son v. Coleman.

Mr. Taney and *Mr. Jones, contra*, stated that there is a contrary decision in 5 Munford, 542, and that Judge Dade had decided in the same way. The presumption could arise only from the acquiescence of the petitioner; but that presumption is rebutted by the state of slavery in which he has been held, which disabled him from asserting his rights.

The COURT (CRANCH, C. J., doubting,) refused to give the instruction.

 TRIPLET v. WARFIELD.

The defendant cannot take advantage of a variance between the writ and declaration, by demurrer, without praying oyer of the writ.

THE *capias* issued in trespass on the case. The declaration was in trespass *vi et armis* for breaking the plaintiff's lamp.

The defendant demurred generally to the declaration, without praying oyer of the writ.

The COURT, after taking time to consider, rendered judgment upon the demurrer, for the plaintiff. See 1 Chitty's Pleadings, 438, 439; *Hole v. Finch*, 2 Wils. 394; *Oakley v. Giles*, 3 East, 167; *Gray v. Sidneff*, 3 B. & P. 399; *Murray v. Hubbart*, 1 Ib. 645; 1 Chitty's Pleadings, 209, 249, 254; *Spalding v. Mure*, 6 T. R. 363.

 JOSEPH SMITH & SON v. GEO. COLEMAN *et al.*

If the name of one of the defendants be omitted in the caption of a deposition, it cannot be read in evidence in the cause.

It is not necessary that the magistrate who takes a deposition under the Act of Congress, should certify that the opposite party had no attorney within one hundred miles of the place of caption, in order to excuse the want of notice.

If the defendant call upon the plaintiff to produce a certain account at the trial, and, when produced, refuses to read it, in evidence, the plaintiff cannot read it to the jury, in evidence, because called for by the defendant.

This was a cause transmitted from Alexandria county, for trial in this county.

Mr. Key, for the defendants, objected to the deposition of Charles H. Hall, because it does not appear to be taken in this cause,—the name of James Anderson, one of the defendants, having been omitted in the caption.

Mr. Jones, contra. On an indictment for perjury, it might be averred that the deposition was made in this cause, notwithstanding the omission of the name. So, in special pleading, it might be averred to be taken in this suit, and proved by parol.

The Union Bank of Georgetown v. Crittenden.

The COURT (*nem. con.*) rejected the deposition, because it did not appear to be taken in a cause in which James Anderson is a defendant.

Mr. Key also objected to the deposition of David Seldon, because the judge had not certified that the defendant had no attorney within one hundred miles of the place of caption. He had certified that no notice was given to the adverse parties, because they were not within one hundred miles, but said nothing of their attorney.

The COURT (*nem. con.*) overruled the objection, because the judge was not required, by the Act of Congress, to give any reason for not giving notice; and, if he had, his certificate would not be conclusive evidence of the fact that neither the party, nor his attorney was within one hundred miles of the place of caption. The defendants, not having had notice, may object, on that ground, and the plaintiffs may show, in fact, that neither the defendants nor their attorney were within the one hundred miles, &c.

The defendants having given notice to the plaintiffs to produce a certain account at the trial, and the plaintiffs having produced it accordingly, the defendants declined to use it; whereupon the plaintiffs offered to read it, in evidence, to the jury. To this the defendants objected, and

The COURT (*nem. con.*) sustained the objection, and refused to permit the plaintiff to read it to the jury. The plaintiffs became nonsuit, but the Court permitted the cause to be reinstated, upon payment of the costs of the term.

The cause, at a subsequent term, was, by consent, returned to the Alexandria docket.

THE UNION BANK OF GEORGETOWN v. CRITTENDEN.

The Court, at a subsequent term, will set aside a judgment irregularly obtained, and quash the execution issued thereon.

A judgment by default, for want of plea, before the expiration of the rule to plead, is irregular, and may be set aside, on motion, at a subsequent term.

The Maryland Act of 1763, c. 23, § 4, does not dispense with the rule to plead, although the declaration be sent and served with the writ twenty days before the appearance Court.

The declaration, in this cause, had been sent out with the writ, and served twenty days before the appearance term, according to the Maryland Act of 1763, c. 23, § 4, — and the defendant entered his appearance in proper person. At the next term a rule was laid on the defendant to plead by the plea day, which was

some day after the end of the term; the judgment by default, for want of plea, however, was entered at the same term, (June term, 1820,) before the expiration of the rule to plead; and an execution was issued thereupon, returnable to the present term.

Mr. Redin, for the defendant, now moved to quash the execution and set aside the judgment for irregularity, and, in support of his motion, filed the defendant's affidavit, stating, that, at the last term, before the judgment was entered, he had requested *Mr. Lookerman*, one of the attorneys of this Court, to enter his appearance, and attend to the suit, which he promised to do. That *Mr. Lookerman* directed the clerk to enter his appearance, which was done, by mistake, in one suit only, there being two between the same parties. It also stated the grounds of his defence, upon the merits of the cause, being sued as indorser, and not having had due notice of non-payment by the drawee of an inland bill, and that the drawer had become insolvent. *Mr. Redin* cited 1 Tidd, 515; 2 Ib. 1089; *Fox v. Money*, 1 B. & P. 250; *Davis v. Owen*, 1 Ib. 344; *Barlow v. Kaye*, 4 T. R. 688; The Maryland Act of 1787, c. 9, § 6; *Wood v. Cleveland*, 2 Salk. 518; *Gerard v. Basse et al.* 1 Dall. 119; *Carrew v. Willing*, 1 Ib. 130.

Mr. Jones, contra. There is no case in which the Court will correct its own judgment after the term. If the record does not show the true judgment of the Court, it may be corrected; but, if the Court itself has irregularly rendered judgment, it has never been the practice to correct it after the term.

But this judgment is not irregular. The copy of the declaration having been served on the defendant twenty days before the return of the writ, the return-term was, by the Act of Assembly, the trial term of the suit; and no rule to plead was necessary. The defendant was not entitled to an imparlance, nor to a rule to plead. *Mr. Jones* cited *Boote's History of a Suit at Law*, 92: 1 Tidd, 101, 356; The Maryland Acts of 1763, c. 23, § 4; 1721, c. 14, § 2, and 1787, c. 9, § 2.

The COURT (*nem. con.*) having taken time to consider, quashed the execution, set aside the judgment, and reinstated the cause.

WISE v. BOWEN.

The defendant in replevin, who justifies under an execution directed to him as a constable, if indemnified by the plaintiff, in the execution, and having no other interest than the possibility of receiving commissions and fees upon an execution which may be issued again in the same cause, is a competent witness for the defendant.

REPLEVIN. The defendant pleads property in one Bellmyer,

and justifies the taking, as constable, under an execution, to him directed, in the cause of *Holtzman v. Bellmyer*. Holtzman, the real defendant, had indemnified the defendant Bowen, who, upon *voir dire*, stated that he was indemnified by Holtzman, and did not think himself interested, unless to the amount of his fees on an execution which might be issued in the case of *Holtzman v. Bellmyer*, in case the property should be found to be in Bellmyer.

The COURT (CRANCH, C. J., doubting,) thought this interest too remote, and permitted the defendant to be sworn as a witness.

MACKALL v. GOSZLER.

If a man lends to his friend his check upon a bank in which he has no funds, upon the assurance of his friend that he will provide funds there to meet it, and the plaintiff, at the time of receiving it, knew that the drawer of the check, at the time of drawing it, had a reasonable expectation that funds would be so placed in the bank, the drawer is entitled to regular notice of the non-payment by the bank.

ASSUMPSIT, against the drawer of a check on the Bank of Columbia.

The defendant lent his check for \$300, on the Bank of Columbia, to Fitzhugh, payable to him or bearer, but had no funds in that bank. Fitzhugh delivered it to the plaintiff, and promised to take it up in ten days; and the plaintiff engaged not to present it to the bank, nor to call on the defendant until the expiration of that period.

The COURT, (THRUSTON, J., absent,) at the prayer of the defendant's counsel, instructed the jury, that, if they should be satisfied, by the evidence, that the defendant, when he drew the said check, had a reasonable expectation that funds would be placed in the said bank, by Fitzhugh, to meet the check, and that such expectation was known to the plaintiff when the said check was presented to the bank for payment, then the defendant was entitled to regular notice of the non-payment thereof by the bank.

Verdict for the defendant. The plaintiff moved for a new trial upon the ground of misdirection of the jury, by the Court, upon the matter of law — and of newly discovered evidence — but the motion was overruled.

EVANS'S HEIRS v. EVANS'S EXECUTORS AND LEGATEES.

When an issue is sent from the Orphans' Court to be tried in this court, and is accompanied by the libel and answer, they may be read in evidence, upon the trial of the issue.

The Bank of Washington v. Peltz's Executors.

THIS was an issue sent from the Orphans' Court, whether the testator was *compos mentis*.

The respondents offered to read the libel and answer, as evidence upon the trial of the issue.

The Judge of the Orphans' Court, in ordering the issue, had directed the libel and answer to be sent to this court.

The Court (*nem. con.*) considered that circumstance as tantamount to an order by the chancellor, in an issue sent from chancery, that the bill and answer should be read in evidence, and admitted the libel and answer to be read to the jury.

Mr. Jones and *Mr. Ashton*, for the libellant. *Mr. Swann* and *Mr. Key*, for the respondents.

THE UNITED STATES v. NEGRO JACK NEALE.

A free colored man who has resided in this district eight years, and publicly acted as a freeman, and so generally reputed to be, is a competent witness for the United States against a free colored person.

INDICTMENT for assault and battery.

The Court permitted *Edward Pleasants*, a black man, to be sworn as a witness for the United States, after proof that he had publicly lived and acted as a freeman for eight years, and was generally reputed to be free.

THE BANK OF WASHINGTON v. PELTZ'S EXECUTORS.

There can be no judgment, in Washington county, against an executor or administrator for a debt of the testator, or intestate, until the Court shall have ascertained the assets, and assessed the sum for which the judgment shall be rendered against the executor or administrator, *de bonis propriis*.

SCIRE FACIAS, to revive a judgment rendered at June term, 1818. The docket entry of that term was "judgment for \$2000 damages and costs; damages to be released on payment of \$600 with interest from 12th December, 1815, till paid, and costs."

Mr. Wallach, for the defendants, moved to quash the *scire facias*, because the judgment was not complete, the Court having never assessed the sum which the defendants (the executors) ought to pay in regard to the amount of assets in their hands, and the debts due to other persons, as required by the Act of Maryland, 1799, c. 101, c. 8, § 8, and contended that no execution could issue until that sum should be assessed, because the execu-

tion must in all cases issue *de bonis propriis*, as well as *de bonis testatoris*.

Mr. Caldwell, contra. It does not appear that the Court did not assess the sum, &c. The defendant may have admitted assets.

THE COURT (THRUSTON, J., absent,) said that there was no judgment against an executor or administrator, until the Court has assessed the sum which the defendants ought to pay, according to the amount of assets in their hands. The docket entry is only an admission of the sum which the testator ought to have paid, if he had been living.

THE COURT quashed the *scire facias*, without costs, and made an order referring the original judgment to the register of wills, to ascertain the amount of assets, and the sum for which the judgment should be rendered.

CIRCUIT COURT OF THE UNITED STATES.

MAY TERM, 1821, AT ALEXANDRIA.

JAMES ANDERSON'S CASE.

A debtor, discharged under the insolvent act, cannot be arrested for a debt contracted before his discharge, although not payable till after his discharge.

JAMES ANDERSON, who had been discharged under the Act of Congress, for the relief of insolvent debtors within the District of Columbia, was arrested for a debt contracted before his discharge, but payable after his discharge.

On motion of his counsel, *Mr. Fendall*, the Court ordered him to be discharged from the arrest, upon entering his appearance without bail.

THE POTOMAC COMPANY v. E. GILMAN.

A corporation aggregate, whose president and treasurer reside in this district, cannot be compelled to give security for costs, as being non-resident plaintiffs.

THE defendant had obtained a rule on the plaintiffs to give security for costs under the Act of Virginia of the 19th of December, 1792, § 23. The clerk objected to swearing the jury until security should be given.

THE COURT, without argument, decided (*nem. con.*) that the rule could not be laid in such a case. The president and treasurer of the company reside in this district, and the company may be sued here.

UNITED STATES v. JESSE CARTER.

If a person, knowing the contents of a forged letter, and with intent to obtain money thereupon, deliver it, although sealed, to the clerk of the person to whom it is addressed, and whom he supposes to be authorized to open it, this is evidence of uttering it.

The act of knowingly uttering as true, a false and forged letter, requesting the person

Thornton v. Chapman.

to whom it is addressed to pay to the bearer a sum of money, with intent to defraud any person, is an offence at common law.

THE grand jury found two indictments against the prisoner at common law. 1st, for knowingly uttering as true a false and forged letter purporting to be from T. Bayley, and addressed to Mr. Jonah Thompson, requesting him to pay to the prisoner \$400, with intent to defraud Mr. Thompson. There was another count charging the same as being done with intent to defraud Mr. Bayley.

The 2d indictment was for uttering a similar letter purporting to be from Israel Janney, and addressed to John Janney, requesting him to pay money to one John Preston.

The COURT, (*nem. con.*) at the request of *Mr. Swann*, for the United States, instructed the jury, that if they should be satisfied by the evidence that the prisoner knew the contents of the letter, and presented it to a person who he supposed was authorized to open it, and with intent to obtain money thereupon, it was evidence of uttering it.

The jury found the prisoner guilty upon each indictment.

Mr. Mason and *Mr. Taylor*, for the prisoner, moved in arrest of judgment, and contended that the indictments did not show any offence at common law. That it was only an attempt to defraud by false pretences, which is only a statute offence. That no person has been actually defrauded, and that an unsuccessful attempt to defraud a person is not an offence at common law. If the attempt had been punishable at common law, there would have been no necessity for the statute of false pretences. They cited 1 Chitty, Crim. Law, 421; *Rex v. Wheatley*, 2 Burr. 1127; *Young v. The King*, 3 T. R. 104; 2 East, 817; 3 Chitty, Cr. Law, 428; The Stat. 33 H. 8, of False Tokens, and the Virginia statute of False Tokens, 18th November, 1789, p. 45; 1 Hawk. 182, c. 70, p. 187, c. 71.

Mr. Swann, *contra*, cited *Ward's case*, 2 Ld. Raym. 1461; *Commonwealth v. Scarles*, 2 Binney, 332; *Savage's case*, Styles, 12.

The COURT (THURSTON, J., absent,) overruled the motion, and entered the judgment.

NICHOLAS THORNTON v. CHARLES T. CHAPMAN.

An umpire must give notice to the parties, and to the arbitrators of the time and place of his proceeding to act upon the subject submitted.

DEBT upon the award of an umpire.

Mr. Taylor, for the defendant, objected at the trial, that the

Whittemore v. Herbert.

umpire had given no notice to the defendant, or to the arbitrators of the time and place of his proceeding to act upon the matter submitted.

The COURT (THRUSTON, J., absent,) was of opinion, and instructed the jury, that the award would not support the plaintiff's action, if they should be of opinion from the evidence, that the defendant had no notice, &c.

Non pros.

 HOLY & SUCKLEY v. WILLIAM RHODES.

It is no defence, at law, to an action by the assignee against the maker of a promissory note, that it was given for the purchase of land which the payee had not conveyed to the defendant as he had covenanted to do upon a previous cash payment made by the defendant; although the note was assigned to the plaintiffs after it was dishonored.

DEBT by the assignees of John Johnston's promissory note for \$550.

Mr. Swann, for the defendant, offered evidence that the note was assigned to the plaintiffs after it was dishonored; that it was given to Johnston in part payment for a house and lot; and that Johnston had not made the title which he had bound himself by his covenant under seal, and under a penalty to make, on payment of \$500 in cash, which were paid. The defendant had not demanded the conveyance, and Johnston was always ready and able to make it.

The COURT (THRUSTON, J., absent,) upon the motion of *Mr. Taylor*, for the plaintiffs, instructed the jury that this was no defence. Verdict and judgment, for the plaintiffs.

 WHITTEMORE v. N. HERBERT.

In an action against the last indorser of a promissory note, it is not necessary to prove the prior indorsements.

ASSUMPSIT against the last indorser of Francis Adams's promissory note for \$1,668. A prior indorsement of J. D. Herbert, was made "by F. Adams, attorney in fact of J. D. Herbert."

Mr. Swann, for the defendant, contended that the plaintiff must prove F. Adams's authority to indorse for J. D. Herbert.

But the COURT (THRUSTON, J., absent,) decided it not to be necessary, as every indorser is to be considered as the drawer of a new bill.

A bill of exceptions was taken, but no writ of error was prosecuted.

 United States v. Negro Pompey.

GREENWAY'S ADMINISTRATOR v. JONATHAN ROBERTS *et al.*

A purchaser under a power given by will to the executor to sell real estate for payment of debts, is not bound to see that the purchase-money is properly distributed among the creditors of the testator.

BILL in equity. William Bushby, by his will devised as follows: "It is my desire that, for the discharge of whatever debts I may owe, that my wife shall sell any part or parts of my real estate to pay and satisfy the same, or to make use of for any purposes which she may judge to be profitable to herself and children." The defendant, Roberts, purchased a part of the real estate under this power to the executrix; and the plaintiff contended that the defendant, Roberts, was bound to see that the purchase-money was properly distributed among the creditors, especially as to debts due by judgment.

But the COURT (THRUSTON, J., absent,) decided that he was not so bound.

Bill dismissed as to the defendant, Roberts.

 THE MECHANICS' BANK OF ALEXANDRIA v. LYNN.

The statute of limitations may be pleaded on the first day of the term next after office-judgment.

The COURT (MORSELL, J., absent,) decided that the plea of the statute of limitations is an issuable plea, and may be pleaded on the first day of the term next after the office-judgment.

Mr. Swann, for the plaintiff.

Mr. Taylor, for the defendant.

 UNITED STATES v. NEGRO POMPEY.

Quære, whether an indictment will lie, at common law, for enticing away a slave.

INDICTMENT at common law for enticing away a slave belonging to Judge Washington.

Verdict, guilty, and the jury assessed the fine at \$50.

The COURT (THRUSTON, J., absent,) were doubtful whether the indictment could be supported in law; but as there was no motion in arrest of judgment, it was entered up for the fine as assessed by the jury. See 1 Haywood, 13; 2 Ib. 106.

CIRCUIT COURT OF THE UNITED STATES.

OCTOBER TERM, 1821, AT WASHINGTON.

DARIUS CLAGGETT'S CASE.

A juror who has a cause at issue which he expects will be tried at the same term, will be discharged, and if not discharged, may be challenged.

DARIUS CLAGGETT, who was summoned as a juror, made affidavit that he had a cause at issue in this Court which he expected would be tried at this term, and prayed to be discharged.

See the Acts of Maryland, 1715, c. 37, § 9; 1778, c. 21, § 2, 3, and 1797, c. 87.

The COURT (MORSELL, J., *contrà*,) discharged him.

UNITED STATES *v.* SAMUEL MILLER.

A witness, in a criminal cause, will be compelled to answer a question which he says, upon his oath, he cannot answer without disclosing a fact which may be material and important evidence to criminate himself, as participator in the same offence for which the defendant stands indicted; provided the Court should be of opinion that no direct answer to the question could furnish evidence against the witness.

INDICTMENT for fighting a duel with one R. Smith. Doctor John A. Kearney, a witness for the United States, was asked whether he saw the defendant shoot at Smith. The witness objected to answer, and said that he could not answer the question without disclosing a fact which might be material and important evidence to criminate himself as participator in the same offence for which the prisoner then stood indicted.

Mr. Jones, for the defendant, in behalf of the witness, contended that he was not bound to answer the question, because it might compel him to disclose a fact which would be a necessary link in the chain of evidence to support a prosecution against himself, if such an one should be instituted, for being concerned in the same misdemeanor; and cited the opinion of Chief Justice Marshall, in *Burr's case*, 1 Robinson's Report of Burr's Trial,

 Tayloe v. Wharfield's Bail.

p. 245, in which he says: "The gentlemen of the bar will understand the rule laid down by the Court to be this:

"It is the province of the Court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness.

"If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case the witness must himself judge what his answer will be; and if he says on oath that he cannot answer without accusing himself, he cannot be compelled to answer."

Mr. Jones, also cited the Statute 46 Geo. 3, c. 37; *Peake's Evidence*, 128, 134, 138, 139, 160, 161, 167, 184; *Phillips*, 206; *Rex v. Edwards*, 4 T. R. 440; *The King v. Inhabitants of Castell Careinion*, 8 East, 77; *Cook's case*, Salk. 153; S. C. 4 St. Trials, 748; *Lord Geo. Gordon's case*, Doug. 593; *Title v. Grevett*, Id. Raym. 1008; *Cates v. Hardacre*, 3 Taunt. 424; *The People v. Herrick*, 13 Johnson, 82; 1 Robinson's Burr's Trial, 212, 222, 242, 245; 4 Bl. Com. 329; 1 Hale, 301; M'Nally, 256.

The fact that the witness was present at the duel was a fact which it would be necessary to prove upon a prosecution against him for being concerned in the misdemeanor. He could not answer the question affirmatively, therefore, without furnishing matter for his conviction.

The COURT however, (CRANCH, C. J., *contra*,) was of opinion that no direct answer to the question could furnish evidence against the witness, and that he was bound to answer it. This the witness still refused to do; and the Court committed him for the contempt. He petitioned the Supreme Court of the United States for a writ of *habeas corpus*, at February term, 1822, but it was refused upon the ground that that Court had no appellate jurisdiction in criminal causes. 7 Wheat. 38.

 TAYLOE V. WHARFIELD'S BAIL.

 Amendment of *scire facias*.

IN one of the recitals in the writ of *scire facias*, the name of Tayloe had been written for that of Wharfield, by mistake of the clerk.

The COURT (*nem. con.*) suffered it to be amended.

Bank of Washington v. Way.

MANDEVILLE v. LOVE.

A judgment of the Circuit Court cannot be superseded without two sureties.

Mr. Wallach, for the defendant, moved the Court to quash an execution which had issued upon a *supersedeas* of a judgment of this Court, acknowledged by the original defendant and one surety only ; whereas the Act of Maryland of 1791, c. 67, requires two.

Mr. Lear, for the plaintiff.

The COURT (*nem. con.*) quashed the execution.

DARNALL'S EXECUTOR v. TALBOT.

The Court, at the imparlance term, will permit the defendant to plead any issuable plea to the merits, although the rule to plead shall have expired.

On the first day of the term the rule to plead expired. *Mr. Key* and *Mr. Dunlop*, afterwards entered their appearance for the defendant, on the imparlance docket, and offered to plead.

Mr. Ashton, for the plaintiff, moved for judgment by default on the rule to plead ; and objected to the defendant's pleading now, unless upon condition of going to trial at this term.

But the COURT (*nem. con.*) permitted the defendant's attorneys to plead any issuable plea to the merits, and refused to order the cause for trial at this term.

BANK OF WASHINGTON v. WAY.

If a note be discounted by the plaintiff for the joint benefit of the maker and indorsers, or if they are jointly interested in the object for which the money is raised, it is not necessary, in order to charge an indorser, to demand payment of the maker, or give notice to the defendant, of the non-payment, although the parties should be interested in unequal proportions, and the defendant should have indorsed as surety for the other parties to the extent that the whole note exceeded his own interest therein.

If a note be made payable in sixty days, by the agent of the indorsers, for his and their joint accommodation, to be discounted at a bank, who refuse to discount it unless made payable in forty-five days, the maker may alter it accordingly, provided it be done at the request, or with the consent, or subsequent approbation of the defendant and the other indorsers, and they receive the benefit of the discount ; but the burthen of proof of such previous consent, or subsequent approbation lies on the plaintiff, and is not to be inferred from the mere circumstance of the defendants afterwards participating in the benefit of the discount.

The maker of a note cannot be compelled to testify for the plaintiff in an action against the indorser, because the maker would be liable for the costs of the suit in case the plaintiff should recover against the indorser ; but the maker's letter to the plaintiff, inclosing the note for discount, may be read in evidence.

This was an action against an indorser of a promissory note

made and signed by "John McGowan, agent," for \$3000, payable originally at sixty days, to be discounted by the plaintiffs, to raise money for a mercantile adventure in which all the parties upon the note were jointly interested. The Bank (the plaintiffs) refused to discount it unless made payable in forty-five days; whereupon the maker, who was the agent of all the parties, in the management of that joint adventure, altered the note accordingly, and it was discounted by the plaintiffs, for the joint benefit of the maker and the indorsers. It was contended by the plaintiffs that this alteration was made with the consent or approbation of all the parties.

The COURT (*nem. con.*) at the prayer of *Mr. Caldwell*, for the plaintiffs, instructed the jury "that if they should be satisfied by the evidence that the note was discounted for the joint benefit of the defendant and the other parties on the note, or that the defendant was jointly interested with them in the gain or loss on the cargo, to raise the money for the purchase of which the note was given, it was not necessary for the plaintiffs to have made any demand of the maker, nor to have given notice to the defendant of the non-payment by the maker." To which instruction the defendant excepted.

Mr. Jones, for the defendant, then prayed the Court, to add to the instruction the following, viz.: "But if the jury believe from the evidence that the note was given and discounted for the aggregate amount of the individual and separate interests of the maker and indorsers; and that each indorser indorsed as security for the other parties to the extent that the aggregate amount of the note exceeded his own individual share of the adventure, then the plaintiffs cannot recover without proving due demand and notice."

But the COURT (*nem. con.*) refused to make this addition to the instruction, and the defendant excepted.

Mr. Swann, for the plaintiffs, then prayed the Court further to instruct the jury, "that if they should be of opinion from the evidence that the note was altered by McGowan, the agent of the parties to the note, so as to make it conform to the discount offered by the Bank, it is not material whether the alteration was made before or after the note was offered to the Bank for discount, provided the alteration was so made at the request, or with the consent of the defendant and the other parties concerned, or they subsequently acquiesced in it, and received the benefit of the said discount."

Which instruction the Court gave, and at the prayer of *Mr. Jones*, for the defendant, further instructed them, "that if the note was so altered after it was drawn and indorsed as aforesaid, and

United States v. Strong.

without the consent and authority of the defendant, before or after, the plaintiffs cannot support their said action on the said note." And further, "that the burthen of proof lies on the plaintiffs to show such previous consent or subsequent approbation on the part of the defendant, and his knowledge of the fact of such alteration at the time he did any act or made any declaration implying a participation in such discount; and that such knowledge, consent, and approbation are not to be inferred from the mere circumstance of his afterwards participating jointly with others in the benefit of the said discount."

To these additional instructions the plaintiffs excepted.

Verdict and judgment, for the plaintiffs.

DAY v. HACKLEY.

In order to hold the defendant to bail in debt on a bond, it need not be produced until oyer demanded, if there be a sufficient affidavit of debt.

The Court will not decide upon the merits, on a motion to appear without bail.

DEBT on a bond. The plaintiff made affidavit that the defendant is justly indebted to him in the sum of \$2000, and upwards, on his bond. The declaration and a copy of the bond were filed.

Mr. Lear, moved for leave to appear for the defendant without special bail; and contended that the original bond ought to be produced; and that, if produced, it would appear that it was of more than twelve years' standing, and therefore, according to the Maryland statute, could not support an action.

Mr. Caldwell, for the plaintiff, opposed the motion.

The COURT (*nem. con.*) said that the affidavit is sufficient. The plaintiff is not bound to produce the bond until oyer is demanded, and the Court will not now go into the merits of the case as to the validity of the bond.

UNITED STATES v. SAMUEL STRONG.

If goods be delivered to a workman for a special purpose, and he afterwards take them away with intent to steal them, it is larceny.

INDICTMENT for stealing sundry copper bolts, the property of the United States.

The prisoner was a workman in the navy yard and employed in driving such bolts. The bolts were delivered to him from the shop where they were cut. He offered to sell them, having first carried them home to his house.

Wetzell v. Bussard.

Mr. Ashton, for the defendant, contended that it was not larceny, unless the defendant took them with intent to steal them. No trespass was committed. There must be an unlawful taking. 1 Hawk. c. 33, § 2.

Mr. Swann, District Attorney for the United States, *contra*, cited 1 Hawk. c. 33, §§ 5 and 6. That if the person to whom the possession of the goods has been delivered by the owner, takes away a part of them, with intent to steal it; as in the case of a carrier, or weaver, or miller, it is larceny; so if one has the bare charge, or the special use of goods, but not the possession of them, as the shepherd, butler, servant, and guest; for in these cases the offence may properly come under the word *cepit*.

The COURT (THRUSTON, J., doubting,) instructed the jury that if they should be satisfied by the evidence that the bolts were delivered to the prisoner for the special purpose of driving them into the vessel, and he afterwards took them away, with intent to steal them, it was larceny.

UNITED STATES v. EVERHARD KROUSE.

A prisoner indicted for horse-stealing, in Washington county, is not entitled to the right of peremptory challenge.

INDICTMENT for horse-stealing.

Mr. Key, for the prisoner, claimed the right of peremptory challenge, and referred to *Samuel Black's case*, at December term, 1819, (*ante*, 195,) where it was allowed.

But the COURT refused to allow it; because in that case the Court had to decide whether they could not sentence the prisoner to death under the law of Maryland.

WETZELL v. BUSSARD.

If the defendant instruct his attorney to plead the statute of limitations, and he pleads it after the rule-day, the Court will refuse to order the plea to be stricken out if the attorney, having been recently admitted to practice, was ignorant of the rule which requires that such a plea should be filed strictly within the rule-day.

The plea of limitations was filed in this cause after the rule-day, and the issue was made up by the clerk.

Mr. Redin and *Mr. Swann*, for the plaintiff, moved the Court to order the plea to be stricken out, because not filed before the expiration of the rule to plead; and cited the case of *Thompson*

Brown v. Piatt.

v. Afflick, in this Court at June term, 1812, (*ante*, 46,) in which the Court decided that they would not receive the plea after the rule-day, unless upon affidavit showing that it is necessary for the justice of the case.

Mr. Jones, for the defendant, opposed the motion, and produced the affidavit of *Mr. Turner*, the defendant's attorney, stating that he was admitted to practice at June term, 1820, which was the return term of the writ in this cause. That his appearance for the defendant was entered at that term; and that during that term he was instructed by the defendant to plead the statute of limitations. That upon inquiring of some of the practitioners at what time it was necessary to plead, he was informed and understood that all pleas would be in time if filed during the second or imparlance term. He did not ask particularly as to the plea of limitations, and did not know that it was an exception to the general rule; and therefore did not file the plea until the second term.

There was also an affidavit of the defendant himself, confirming that of *Mr. Turner*, and stating facts tending to show that the plea was necessary to the justice of the case.

The COURT (*nem. con.*) refused to strike out the plea, principally on the ground stated in the affidavit of *Mr. Turner*.

There was a demurrer to the evidence, upon which this Court rendered judgment for the defendant at October term, 1822; which was affirmed by the Supreme Court of the United States. 11 Wheat. 309.

BROWN *v.* PIATT.

If the action be against three persons, and one only be arrested, and a deposition be taken, under the Act of Congress, to be used in the trial of that cause, naming the three defendants — the two defendants, not taken, ought to be notified if they live within 100 miles of the place of caption.

It is no objection to a deposition, that the magistrate omitted to certify that he cautioned the witness.

It is not sufficient evidence of the execution of the notes upon which the suit is brought, to prove by a witness that he had formerly been in possession of notes which the defendant admitted to be his genuine notes, and that the notes in question were like those, and that the witness believed them to be genuine.

To support an action against the maker of a note payable at a particular place, it is not necessary to prove a demand of payment at that place.

THE plaintiff offered in evidence, a deposition, taken under the Act of Congress, and the magistrate certified that notice was not given to the defendant *Piatt*, because he was not within 100 miles of the place of caption.

Mr. Jones, for the defendant, objected that as the writ was

Costin v. Corporation of Washington.

issued against Piatt and two others, and the title of the suit in the deposition was *Brown v. Piatt* and two others, and as the two others were within 100 miles, they ought to have been notified although they had not been taken. If Piatt is to be considered as the only defendant, then the title of the suit in the deposition is wrong, and the deposition is not taken in the right suit.

Mr. Key, for the plaintiff.

The COURT, (THRUSTON, J., *contra*,) rejected the deposition.

The plaintiff produced certain notes, purporting to be the notes of Piatt & Co., and a witness (Mr. Riggs) who testified that he had formerly been in possession of notes which were admitted by the defendant Piatt, to be genuine notes of Piatt & Co.; and that the notes now produced by the plaintiff are like those, and that he (the witness) believed them to be genuine.

The COURT did not consider this evidence as sufficient proof of the execution of the notes to permit them to be given in evidence to the jury.

Mr. Jones objected to the deposition that the magistrate had not certified that he "cautioned" the witness; he had only stated that the witness was duly "examined and solemnly affirmed," &c., but the Court overruled the objection.

Further evidence having been produced the Court permitted the notes to be read in evidence to the jury. They purported to be notes of Piatt & Company, for various sums of twenty dollars and upwards, amounting in the whole to \$3,404, payable to E. Hall or bearer, at their banking house in Cincinnati.

Mr. Jones, for the defendant, then prayed the Court to instruct the jury that the evidence so offered by the plaintiff was not competent and sufficient of itself to support the plaintiff's count upon the notes, for want of proof that they had been presented for payment at the defendants' banking house; but the Court refused to give the instruction. Verdict for plaintiff.

Bills of exception were taken by the defendants' counsel, and upon writ of error to the Supreme Court of the United States, the judgment of this Court was affirmed, at February term, 1822.

BILLY COSTIN, a free colored man, Appellant, v. THE CORPORATION OF WASHINGTON, Appellee.

The clause in the charter of Washington which gives power to the corporation "to prescribe the terms and conditions upon which free negroes and mulattoes may reside in the city," is applicable only to those persons of color who come to reside in the city after the promulgation of such terms and conditions. That clause in

Costin v. Corporation of Washington.

the charter is not, in itself, repugnant to the constitution of the United States; nor is the by-law of the 14th of April, 1821, c. 133, in its prospective operation.

THIS was an appeal from the judgment of a justice of the peace of the county of Washington for the penalty of five dollars under the 7th section of the by-law of the corporation of Washington, passed on the 14th of April, 1821, c. 133, entitled "An act to prescribe the terms and conditions upon which free negroes and mulattoes may reside in the city of Washington, and for other purposes." The first section requires the city commissioners to give notice to all free persons of color in their respective wards to appear before the mayor within thirty days from the time of such notice with their evidence of freedom, and subscribe a statement of their trades, or means of subsistence, and of their family. The third section requires every free negro or mulatto, at the time of his appearing before the mayor, according to the first section, to produce a satisfactory certificate from three respectable white inhabitants, householders in his neighborhood, as to his living peaceably, his means of subsistence, and his character. The fifth section requires every free male colored person, who then resided in the city of Washington, whose evidence of freedom should be found satisfactory to the mayor, "to enter into bond with one good and respectable white citizen, as surety in the penalty of twenty dollars, conditioned for the good, sober, and orderly conduct of such person or persons of color, and his or her family for the term of one year, and that such person or persons, his or their family, nor any part thereof, shall not, during the said term of one year, become chargeable to the corporation in any manner whatsoever, and that they will not become beggars in or about the streets," &c., whereupon they shall obtain a license to reside, &c. The 7th section imposes a penalty of five dollars on every person of color, who may have been notified as aforesaid, who shall be found residing within the limits of the city after the expiration of the thirty days aforesaid, without having entered into the bond and obtained the license as aforesaid, for the first week he may continue so to reside.

The cause was argued by *Mr. Caldwell*, for the appellant, and *Mr. Law*, for the appellee.

CRANCH, C. J., delivered the opinion of the Court.

The ground of the judgment of the justice of the peace, in the present case, is, that the defendant was found residing, and had continued to reside one week, within the limits of the city after the expiration of thirty days from the time of the notice given to him, according to the provisions of the first section of the by-law, without having entered into the bond, and obtained the license, agreeably to the provisions of the fifth section.

On the part of the appellant, it has been contended, 1st. That the by-law is not authorized by the charter; and 2d. That if it is, the charter is, in that respect, repugnant to the constitution of the United States.

1. Upon the first point, it is said that the clause in the charter must be construed prospectively, and not retrospectively. That it could not reasonably be supposed to be the intention of Congress to banish old and long-established inhabitants of the city who have acquired real estates therein, whose lives have been unexceptionable, who can neither be reproached for, nor suspected of any crime. Such a construction of the charter would abolish the distinction between moral good and evil; would inflict punishment on the innocent, and would take away the incentive to good conduct. That the process to require surety for good behavior was a criminal process; and that, at common law, such surety could only be demanded upon conviction of some offence. That it is not reasonable to suppose that Congress intended that color alone should be a good cause for demanding it. That the constitution knows no distinction of color. That all who are not slaves are equally free; that they are equally citizens of the United States, and that although some of the States do not admit people of color to the right of voting at elections, or of serving on juries, or of bearing arms, as a part of the militia, yet they are as much citizens of the United States, as those free white persons in Virginia who have no freehold, or those in the other States who have not the property required to qualify them to vote or to serve on juries, or who are too aged to be enrolled in the militia. That those people of color, who are citizens of any State in the Union, have a right to come here and claim all the privileges of citizenship under that clause of the constitution which gives to the citizens of each State all the privileges and immunities of citizens in the several States. That to cause a warrant to issue for surety of good behavior or of the peace, without an allegation of some crime actually committed, or of the apprehension of some crime, supported by oath, or affirmation, would be contrary to the constitution of the United States, and therefore the charter must not be construed so as to give that power.

2. On the 2d point, it is said, that if the charter is capable of such a construction as to warrant the by-law, the reasons which have been urged to show that such a construction is inadmissible, show also that the charter, in that respect, is unconstitutional.

But in answer to this position it may be said, that if those reasons are not sufficient to show that the by-law is not warranted by the charter, they are not sufficient to show that the charter is unconstitutional; for before the by-law can be warranted by the

charter, the charter itself must be shown to be warranted by the constitution. And if the constitution prescribes any limits to the terms which the corporation may impose upon free persons of color as the condition of their residence in the city, they are bound by those limits, however broad may be their charter.

The clause in the charter does not, in itself, seem to be repugnant to the constitution. The power, given by that clause, may be so exercised by the corporation as not to violate any right secured by the constitution. The only question, then, is, whether the by-law itself is unconstitutional. What constitutional right does it violate? It is said that the constitution gives equal rights to all the citizens of the United States, in the several States. But that clause of the constitution does not prohibit any State from denying to some of its citizens some of the political rights enjoyed by others. In all the States certain qualifications are necessary to the right of suffrage; the right to serve on juries, and the right to hold certain offices; and in most of the States the absence of the African color is among those qualifications. Every State has the right to pass laws to preserve the peace and the morals of society; and if there be a class of people more likely than others to disturb the public peace, or corrupt the public morals, and if that class can be clearly designated, it has a right to impose upon that class, such reasonable terms and conditions of residence, as will guard the State from the evils which it has reason to apprehend. A citizen of one State, coming into another State, can claim only those privileges and immunities which belong to citizens of the latter State, in like circumstances.

But the present case is like that of a State legislating in regard to its own citizens, and I can see no reason why it may not require security for good behavior from free persons of color, as well as from vagrants, and persons of ill-fame.

The clause of the constitution which requires that warrants should be founded upon probable cause, supported by oath or affirmation, does not apply to the warrant in this case, which was for a debt due as a penalty for the violation of a by-law. But it is said that the charter does not apply to those free negroes and mulattoes who were residing in the city when the charter was granted. No law ought to be construed to have a retroactive effect unless the intention of the legislature be clear. The words of the charter, in this respect are equivocal. They are, "To prescribe the terms and conditions upon which free negroes and mulattoes may reside in the city." The word "prescribe" is prospective, and seems to imply that the rule is to be applied only to those who should come to reside in the city after the promulgation of the rule. It would seem to be unreasonable to suppose

Ritchie's Administrator v. Stone.

that Congress intended to give the corporation the power to banish those free persons of color, who had been guilty of no crime, and who, by their residence had acquired a right to support under the poor-laws. Many such persons had been long residents of the city; some had been born there; had been useful members of society; had acquired property, and had contributed to the growth and improvement of the city, and had paid taxes for the support of the poor. They could not compel any white person to become their surety; and banishment would be the consequence of their inability to give the security required; unless they should submit to repeated imprisonments in the workhouse, and to the breaking up of their families, the ruin of their business, and the binding out of their children by the guardians of the poor. If such had been the intention of Congress they might have expressed it by using unequivocal terms; as they have not, I feel myself bound, by the ordinary rules of construction, to say, that the charter only authorizes the corporation to prescribe the terms and conditions of residence for those persons of color who should come to reside in the city after the promulgation of such terms and conditions. In the present case the appellant was a resident of the city at the time of the charter, and has continued to reside there ever since, and therefore was not a person in regard to whose residence the corporation had, by the charter, a power to prescribe terms and conditions; and consequently was not liable to the penalty of the 7th section of the by-law.

I am, therefore, of opinion that the judgment ought to be reversed with costs.

The other judges concurred. Judgment reversed, with costs.

RITCHIE'S ADMINISTRATOR v. STONE.

A justice of the peace has no jurisdiction of an action against an administrator.

APPEAL from the judgment of a justice of the peace rendered against the appellant in favor of the appellee for \$20 and costs.

The appellant was administrator of Abner Ritchie, who was administrator of J. W. Goldsborough, and, as such, had the sum of \$94 to be distributed among four distributees, of whom Stone was one.

Mr. Key, for the appellant, contended that a justice of the peace has not jurisdiction in cases against administrators, under the Maryland Act of 1791, c. 68, and stated that a new statute had been lately passed in Maryland, to remedy the defect. The jus-

Van Ness v. Heineke.

tice cannot carry the testamentary system into effect. He cannot ascertain assets and render judgment according to the assets, nor appoint an auditor to ascertain them; nor render judgment for further assets when they shall appear.

Mr. Taney contra, contended that the justice has power to do all that this court may.

But the COURT, after taking time for consideration, reversed the judgment, 29th November, 1821.

GUSTAVUS HOWARD v. THE UNITED STATES.

Appeal. Profane swearing.

APPEAL from the judgment of a justice of the peace, imposing a fine, for profane swearing in his presence.

The COURT dismissed the appeal, saying that no appeal lies in such a case. (CRANCH, C. J., doubting.)

UNITED STATES v. LOGAN.

Public cruelty to a horse is an indictable offence.

INDICTMENT for cruelty to a horse in a public street in Washington.

Verdict, guilty. Sentence \$10 fine, and twenty days' imprisonment.

VAN NESS v. HEINEKE.

It is no objection to a deposition that, in the caption, it is not stated in what county the cause is depending; nor that the name of one of the parties is misspelled, nor that the magistrate has not certified that he reduced the testimony to writing in the presence of the witness, nor that the witness signed it in the presence of the magistrate.

Mr. Lear, for the plaintiff, offered a deposition in evidence.

Mr. Marbury, for the defendant, objected to the reading of it,

1. Because the cause is stated, in the caption of the deposition, as depending in the Circuit Court of the District of Columbia, without stating in which county.

2. Because the name of the defendant is misspelled. In the deposition it is spelled Heineck, but in the writ it is spelled Heinekee. In the declaration it is spelled Heineck, as in the deposition.

BESTOR *v.* SARDO.

3. Because the deposition, although written by the magistrate, is not certified to have been written in the presence of the witness ; nor to have been signed by the witness in the presence of the magistrate.

The COURT overruled the objection.

THRUSTON, J., thought the first objection was fatal.

MADDOX *v.* THORNTON.

The feeding and training a race-horse is not an immoral consideration, and will support an assumpsit to pay for the same.

Mr. Law, for the defendant, contended that the feeding and training the defendant's race-horse, for the worth of which this action was brought, was an immoral consideration, and within the reason of the decision of this Court in the case of *Holmead v. Maddox*, at December term, 1818, [*ante*, 161.]

Mr. Jones, contra.

The COURT (CRANCH, C. J., doubting,) said that this case did not come up to that. The horse might be training for a private race ; or no race might be run, &c.

BESTOR *v.* SARDO.

If, upon a motion for the continuance of a cause upon affidavit that a material witness is absent, the opposite party, to prevent the continuance, admits that the absent witness would, if present, testify as stated in the affidavit, he is not thereby precluded from offering evidence at the trial to disprove or explain away the force of the testimony which he has admitted that the absent witness would give.

REPLEVIN. Avowry for rent arrear. Upon the plaintiff's affidavit for the continuance of the cause to the next term, on account of the absence of a witness who, he stated, would testify that the plaintiff did not get full possession of the house until some time after the rent was to commence. The defendant, in order to prevent the continuance, admitted that the absent witness would, if present, testify as stated in the affidavit. At the trial *Mr. Ashton*, for the defendant, offered evidence to prove that the plaintiff was permitted to occupy the house for some time before the commencement of the term, and in consideration thereof permitted the defendant to occupy two rooms in the house, for some time after the rent began to accrue.

To the admission of this evidence, *Mr. Law*, for the plaintiff, objected, because, as he contended, the defendant's counsel had admitted the fact which the absent witness would testify.

Negro Dunbar v. Ball.

The COURT, however, (*nem. con.*) said that the spirit of the Act of Maryland, 1787, c. 9, respecting continuances, was, that the party applying for the continuance, should have the same benefit only which he would have had if the witness were present; and permitted the defendant's counsel to offer evidence to explain the fact of the possession being withheld of a portion of the premises.

 NEGRO LEONARD DUNBAR v. JAMES BALL.

If a citizen of the United States owning a slave in Virginia, and residing there, removes to the county of Washington, in the District of Columbia, with a *bonâ fide* intention of settling therein; and afterwards causes the said slave to be brought into said county, through the county of Alexandria, within one year after such removal; and if the owner, within three years after such removal, sell the said slave, the slave thereby becomes entitled to freedom; notwithstanding the Acts of Congress of the 3d of May, 1802, § 7, and 12th of June, 1812, § 9, the said slave having been in Alexandria county merely *in transitu*.

PETITION FOR FREEDOM. The facts were agreed to be as follows:—“The petitioner is a native-born slave of Virginia, and was there purchased by one John B. Brunet, a citizen and inhabitant of that State, some time in the month of March, 1820; and continued there in the possession and service of said Brunet, until some time about the 25th of March last (1821,) when the said Brunet removed from the said State into the District of Columbia and settled himself as a citizen and inhabitant of Georgetown, in the county of Washington, leaving the said petitioner in Virginia for about three weeks after such removal of said Brunet, the said petitioner continuing to be the *bonâ fide* property of said Brunet, and so being the *bonâ fide* property of the said Brunet, was, in about three weeks after the removal and settlement of the said Brunet in Georgetown, as aforesaid, brought, by the order of said Brunet, from Virginia, through Alexandria county, into Georgetown aforesaid, and there continually kept in the possession and service of the said Brunet, until some time about the 20th of July last (1821,) when the petitioner was sold in Georgetown, by said Brunet to the defendant as a slave for life.”

By the 1st section of the Act of Maryland, 1796, c. 67, adopted by Congress as the law of this county, a slave brought into the State, for sale, or to reside, ceases to be property, and becomes free. By the 2d section, however, it is provided that it shall be lawful for any citizen of the United States who shall come into the state with a *bonâ fide* intention of settling therein, to bring into the State, at the time of his removal, or within one year thereafter, any slave, the property of such citizen at the time of his removal, and to retain the same as a slave.

But by the 3d section it is enacted, “That nothing herein con-

Munro's Executors v. Robertson.

tained, shall be construed to enable any person or persons, so removing as aforesaid, to sell or dispose of any slave or slaves, imported by virtue of this act, or their increase, unless such person or persons shall have resided within this state three whole years next preceeding such sale, except in cases of disposition by last will and testament, and dispositions by law for *bonâ fide* debts, or consequent upon intestacy."

By the Act of Congress of the 3d of May, 1802, § 7, [2 Stat. at Large, 193,] it is enacted, "That no part of the laws of Virginia or Maryland, declared by an Act of Congress passed the twenty-seventh day of February, 1801, 'concerning the District of Columbia,' to be in force within the said district, shall ever be construed so as to prohibit the owners of slaves to hire them within, or remove them to, the said district, in the same way as was practised prior to the passage of the above-recited act."

And by the 9th section of the act of the 24th of June, 1812, [2 Stat. at Large, 755,] it is enacted, "That hereafter it shall be lawful for any inhabitant or inhabitants in either of the said counties, owning and possessing any slave or slaves therein, to remove the same from one county into the other, and to exercise freely and fully all the rights of property in and over the said slave or slaves therein, which would be exercised over him, her, or them, in the county from whence the removal was made, any thing in any legislative act in force, at this time, in either of the said counties, to the contrary, notwithstanding."

Mr. Jones, for the defendant, contended that the Act of Maryland, 1796, c. 67, was a penal law, and ought to be construed favorably to prevent a forfeiture. It merely prohibits the sale within the three years, but a sale contrary to the act does not give freedom to the slave. The sale is only void.

But, under the act of the 24th of June, 1812, Brunet, as soon as he brought his slave into Alexandria county, which he had a right to do under the act of the 3d of May, 1802, had a right to remove him to Washington county, and there exercise over him fully all the rights of ownership.

Mr. Toney, for the petitioner, contended that the act of 24th June, 1812, was only applicable to *bonâ fide* inhabitants and residents of Alexandria county, not to a person merely *in transitu*.

The Court (*nem. con.*) rendered judgment for the petitioner.

MUNRO'S EXECUTORS v. SAMUEL ROBERTSON.

If a deed purports to be made "for a valuable consideration," it is competent for a person claiming under it, to give evidence of a money consideration.

This was an attachment, under the Maryland Act of 1795, c. 56,

Ringgold v. Renner.

levied upon the lands of an absent debtor. Part of the lands had been conveyed by the debtor, to certain trustees, to secure certain creditors, by a deed of bargain and sale, the consideration of which was stated in the deed to be "for value received," and in consideration of certain trusts in another deed mentioned to be performed by the trustees, &c. The deed referred to was not a legal conveyance, because not recorded in time, but it was upon a money consideration.

Mr. Key and *Mr. Dunlop*, for the plaintiffs, contended that the deed, being a bargain and sale, was void, because not stated to be in consideration of money paid, and cited 2 Bl. Com. 296, 338; and *Gittings v. Hall*, 1 Harris & Johnson's Rep.

Mr. Lear, for the creditors secured by the deed, contended that it was competent for him to prove a money consideration. *Cheney v. Watkins*, 1 Har. & Johnson, 530.

The COURT (MORSELL, J., absent,) refused to render judgment of condemnation, and said that the consideration, being stated in the deed to be "*value received*," a money consideration may be averred and proved; especially as the second deed refers to the first, in which a money consideration is stated.

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RINGGOLD, for the use of Lindsay & Hill, v. DANIEL RENNER, appearance bail of John Renner.

The defendant has the whole of the return term to appear in, and if the plaintiff withdraws his action before the end of the term, he cannot maintain a suit on the bail-bond.

DEBT on bail-bond. Pleas—1st. A release. 2d. That John Renner came during the term and offered to appear, but the plaintiffs, Lindsay & Hill, had struck off their suit. 3d. That the defendant, John Renner, appeared at the day, &c.

Mr. Key and *Mr. Dunlop*, for the defendant, contended that this Court had decided, in the case of *Rhodes v. Brooke*, at December term, 1804, (1 Cranch, C. C. 206,) that the defendant had a right to appear at any time during the first term, although the plaintiff should have taken an assignment of the bail-bond. The bail-bond cannot be forfeited until the expiration of the time for appearance, given by the rules of the Court. *Bullock v. Lincoln*, 2 Strange, 914. The plaintiffs, by voluntarily dismissing their suit, confess that they have no cause of action against the principal, and then the bail-bond cannot be assigned. The plaintiffs prevented the defendant from appearing, according to the condition of the bond.

McCleod v. Gloyd.

Mr. Marbury, contra, contended that the defendant was bound to appear on the first day of the term, when the appearance docket is called; and, if he does not, the plaintiff may amerce the marshal, or take an assignment of the bail-bond. Although the plaintiffs had ordered the suit to be stricken off, the defendant might have had leave of the Court to enter his appearance to save the forfeiture of the bond.

The COURT decided that the defendant had, by the practice of this Court, the whole term in which to appear and give special bail; and that the plaintiffs, by dismissing their action during the term, had prevented the defendant from complying with the condition of the bond. Verdict, subject to the opinion of the Court.

Judgment for the defendant.

 COOK v. BEALL.

The Court will, on affidavit, reinstate a cause *non-prossed* on a rule for security for costs laid on the plaintiff who had no attorney in court, his attorney having died, and no rule served on the plaintiff to employ new counsel.

THE plaintiff's attorney died. The defendant laid a rule on the plaintiff to give security for costs, and *non-prossed* him upon that rule, without having served a rule on the plaintiff to employ new counsel.

The COURT, upon affidavit, reinstated the cause.

 JOHN McCLEOD v. GEORGE H. GLOYD.

The Court will permit an action of *replevin* which has been discontinued at a former term, by reason of the non-appearance of the defendant, to be reinstated, and the continuances entered up, upon affidavit, that the defendant's counsel, or attorney, on a day during the term, directed the clerk to enter his appearance, and that the clerk neglected to make the entry on the docket.

REPLEVIN, returnable to June term, 1820 — discontinued by the non-appearance of the defendant.

Mr. Ashton, for the defendant, now, (October term, 1821,) upon affidavits of himself and Gloyd, stating, that at June term, 1820, he had directed the clerk, or his deputy, then having charge of the docket, in court, to enter his appearance for the defendant, and that he promised to do so, but neglected it, moved the Court to reinstate the cause, and to direct the continuances to be entered up: —

Granted.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1821, AT ALEXANDRIA.

BOWIE & KURTZ v. R. S. BLACKLOCK.

It is a sufficient excuse for not giving notice to the indorser of the non-payment of a promissory note by the maker, that the holder called at the usual place of business of the indorser, in business hours, and found it shut and no person there to receive notice.

ASSUMPSIT, against R. S. Blacklock, surviving partner of the firm of N. & R. S. Blacklock, who were indorsers of William F. Thornton's note due 25th August, 1818. On that day N. Blacklock, one of the partners, died at Port Tobacco, in Maryland, and the storehouse in Alexandria, where they usually transacted their mercantile business, was shut when the notary came, within the usual business hours, and knocked hard at the door, but no person appeared to whom he could give notice of the non-payment by the maker, of the note. The defendant's dwelling-house was in Alexandria, a short distance from the storehouse; but no notice was given or left at the dwelling-house.

The Court (*nem. con.*) at the last term, had, upon the trial, instructed the jury, that the plaintiffs could not recover, for want of notice to the defendant.

The verdict being for the defendant, the Court permitted the plaintiffs to move for a new trial, on the ground of misdirection of the jury upon the question of notice.

Mr. Taylor, for the plaintiff, cited *Crosse v. Smith*, 1 Maule & Selwyn, 545, and *Parker v. Gordon*, 7 East, 385.

Mr. Mason, *contrà*, cited Chitty, 136, 201, 202.

The Court (THRUSTON, J., absent,) overruled the opinion before given, and instructed the jury that the holder of the note was only bound to call at the usual place of business of the defendant, in business hours; and if it be shut, and no person there to receive notice, the holder is excused for not giving notice.

United States v. Columbian Insurance Company.

UNITED STATES, at the instance of John Wheelwright, v.
THE COLUMBIAN INSURANCE COMPANY OF ALEXANDRIA.

The Columbian Insurance Company of Alexandria cannot, by a trustee, vote in an election of directors of the company, upon stock of the same company, purchased by the company, and held for their use in the name of the trustee.

A writ of error to the judgment of the Circuit Court of the District of Columbia, awarding a peremptory *mandamus*, is a *supersedeas*, and if the peremptory *mandamus* be issued after the filing of the writ of error, and within ten days after the rendition of the judgment, it will be quashed.

ON the 12th of December, 1821, John Wheelwright and five others, filed their petition, supported by the affidavit of Wheelwright, praying for a rule on the judges of the election of directors of the Columbian Insurance Company of Alexandria, to show cause why a *mandamus* should not issue commanding the said judges of election to return the petitioners as duly elected directors of the said company, and also for a rule upon the said company to admit the petitioners as directors.

The petitioners state that they are, and have been for twelve months and upwards stockholders of that company. That on the 31st of July, 1821, the then board of directors passed an order that 1233 shares of the stock of that company, the property of one Edward Lloyd, should be purchased; and that the sum of \$8,500 should be borrowed, upon stock owned by the said company in the Bank of the United States, to assist in the payment for the same; all which was done and the shares were transferred by Lloyd to Joseph Mandeville in trust for the Columbia Insurance Company.

That the annual election of directors took place on the 5th of November, 1821. That there were two lists of directors voted for, one of which included the petitioners, and that the directors named on that list were duly elected, if the said Joseph Mandeville had no right to vote upon the 1233 shares there standing in his name, as the trustee of the company. That his right so to vote was denied by the petitioners at the election, and a written notice of the objection was delivered to the judges of the election in due time, and before the election was closed; but they received the vote which gave the preponderance to the opposing ticket.

A rule was granted, according to the prayer of the petitioners, to show cause, &c., on Saturday, the 15th of December, 1821; which rule, upon hearing, was made absolute, and writs of *mandamus nisi*, were issued returnable on the 22d of December. The Columbian Insurance Company returned the writ on that day, and for return said, "That the said John Wheelwright ought not to be admitted as a director of the said company, because they say that

United States v. Columbian Insurance Company.

at the election of directors in the said writ mentioned, the said John Wheelwright was not duly elected a director of the said company; and that at the said election, the said Joseph Mandeville, whom they are required to remove, was duly elected a director of the said company."

This return being traversed by the United States, and issue thereupon joined, the jury found a special verdict, in which they set forth the Act of Congress of the 16th of February, 1818, [6 Stat. at Large, 198,] incorporating the Columbian Insurance Company of Alexandria, and the original articles of association, under which the company transacted its business before its incorporation. They also found that at a meeting of the board of directors of the said company on the 31st of July, 1821, they made an order that 1233 shares of the stock of the company, the property of one Edward Lloyd, should be purchased for the use of the company, at 80 per cent.; and that the president of the company should be authorized to obtain a discount at the office of discount and deposit at Washington, for the use of the company, of \$8,500, upon the pledge of eighty-five shares of the stock of the Bank of the United States, the property of the company. That the said shares were purchased according to the order of the board, and were, on the 1st of August, 1821, transferred by the said Lloyd to Joseph Mandeville, "as trustee of the Columbian Insurance Company of Alexandria." That an election of directors was holden on the 1st Monday in November, 1821, by the commissioners duly appointed by the board of directors on the 1st day of November in the same year. That Mandeville voted upon the 1233 shares of stock so held by him in trust, with the knowledge and consent of the commissioners of election who were apprised of the circumstances, and were of opinion that he had a right so to vote, and received his vote accordingly. That Wheelwright was not present when the vote was given in, but afterwards came in, while the election was going on, and before the votes were taken out of the ballot-box to be counted, and delivered to the commissioners the following written notice:—

"I object to the vote of Joseph Mandeville, as trustee for the Columbian Insurance Company on 1233 shares of stock bought by the company of Joseph Mandeville, as trustee for the Columbian Insurance Company. John Wheelwright."

That the said shares were contracted to be sold by the said Lloyd to the said Mandeville, on the 8th of June, 1821, with a view that the company should afterwards become the purchaser thereof. That the said Mandeville gave his note, indorsed by Newton Keene and James Sanderson, to the said Lloyd, for \$9,564, payable in 60 days from the 8th of June, for the said stock. That

United States v. Columbian Insurance Company.

the said shares had been duly and regularly subscribed and paid by one or more original subscribers to the said company, and had been duly and regularly assigned to the said Lloyd, before the purchase and transfer from him to the said Mandeville, and as such, were entitled in the hands of the said Lloyd, at the time of such purchase and transfer, to all the advantages, profits, and privileges of shares regularly forming component parts of the capital stock of the said company.

That on the 5th of November, 1821, before the election was opened, at a meeting of the board of directors, duly convened, it was by the board resolved that the said Joseph Mandeville as such trustee, should be instructed, and he was by such resolution instructed, to vote upon the said stock as such trustee, at the said election, for certain persons in the said resolution named as such directors; and that he voted accordingly. That the said John Wheelwright, although then a director, was not present when the ballot was taken to instruct the said Mandeville to vote as aforesaid.

The jury conclude by finding that if the said Mandeville had not a right in law to vote upon the 1233 shares, then the said John Wheelwright, and the others on the same ticket were duly elected directors of the said company; but if he had a right to vote on those shares, the said Joseph Mandeville, and the others on the same ticket, were duly elected. This special verdict was rendered on the 1st of January, 1822, and on the 3d, the court rendered judgment upon the verdict in favor of the petitioners, that a peremptory *mandamus* should be issued.

Upon this judgment the petitioners, respectively, sued out their several writs of peremptory *mandamus*, on the 10th of January, 1822, before the expiration of the ten days allowed by the 23d section of the Judiciary Act of 1789, [1 Stat. at Large, 73,] for filing a writ of error, which writs of *mandamus* were in the following form:—

[L. s.] District of Columbia, to wit. The United States of America. To the Columbian Insurance Company of Alexandria, greeting:—

“Whereas at a late election of directors of the Columbian Insurance Company of Alexandria, on the 5th day of November last, pursuant to the Act of Congress, in such case provided, John Wheelwright was duly elected by the stockholders, or proprietors of the said corporation, and by a plurality of votes actually given, a director of the Columbian Insurance Company of Alexandria; you, nevertheless, the said Columbian Insurance Company of Alexandria, lightly regarding the premises, have wrongfully, injuriously, and unlawfully, and without reasonable cause, refused to

United States v. Columbian Insurance Company.

admit the said John Wheelwright, as a director of the said Columbian Insurance Company of Alexandria, to the no small damage and grievance of the said John Wheelwright, as by his complaint we have understood. We, therefore, being willing that due and speedy justice be done in this behalf, as is reasonable, command you that immediately after the receipt of this, you admit the said John Wheelwright as duly elected a director of the said Columbian Insurance Company of Alexandria, at the time and place of election aforesaid; and that you remove Joseph Mandeville, who is alleged to have been unduly and wrongfully admitted as aforesaid; with all liberties, privileges, and pre-eminences to that office belonging or appertaining; and that you make return of this writ to our United States Circuit Court of the District of Columbia, for the County of Alexandria, immediately on the receipt thereof.

“Witness the Honorable William Cranch, Chief Judge of our said Court, this 10th of January, 1822. Edmund J. Lee, C. C.”

These writs were, on the 11th of January, served on the company, who refused to obey them; and on the 15th of January, the petitioners obtained a rule upon the persons returned as directors of the company, to show cause why an attachment should not issue against them for not obeying the peremptory *mandamus*. This company, at the same time obtained a rule upon the petitioners, to show cause why the writs of peremptory *mandamus* which had been issued, should not be quashed. Before the expiration of the ten days after the judgment of the Court upon the special verdict, the company took out, and served upon the adverse party, a writ of error, with the requisite security to operate as a *supersedeas*, if a writ of error will lie in the case; notwithstanding which,

Mr. Fendall, for the relators, now moved the Court, the ten days not having yet expired, to order the clerk to issue a writ of peremptory *mandamus*, upon the judgment which the Court had rendered upon the verdict. He contended that no writ of error would lie in a case of *mandamus*, and if it would, it would not be a *supersedeas*, and therefore the relators need not wait the expiration of the ten days, before they took out their peremptory writs of *mandamus*. And he cited 4 Bac. Ab. 522, 543; Stat. 9 Anne, c. 20, § 2; *The case of the Dean and Chapter of Trinity Chapel, Dublin*, 8 Mod. 27; S. C. 1 P. Williams, 318; 2 Brown, Parl. Ca. 554; 3 Ib. 178; and the Virginia Act of Assembly of the 22d of January, 1799, c. 253, p. 392, which gives a right to traverse the return of a *mandamus* in all cases, and the right to recover damages and costs in the same manner as in an action upon the case, and if judgment shall be given for the complainant

either on verdict, or demurrer, or *nil dicit*, or for want of replication or other pleading, he shall recover his damages and costs, and shall have execution therefor, and a peremptory writ of *mandamus* shall be granted without delay, as if such return had been adjudged insufficient. This act seems to be but a new edition of the English Statute of 9 Anne, c. 20, § 2, as it had been construed and practised upon in the English Courts. It says nothing of a writ of error.

Mr. Swann, on the same side, contended, that if a writ of error will lie in a case where there was a traverse, yet it would be only to the judgment on the verdict, and would be no *supersedeas* to the peremptory writ of *mandamus*. *The case of the Dean and Chapter of Dublin v. Dowgatt*, 1 P. Williams, 352. The Act of Virginia says that the peremptory *mandamus* shall issue without delay.

Mr. Taylor and Mr. Jones, contra.

The cases cited are only applicable to cases of *mandamus*, at common law, where the return was conclusive, and could not be traversed; and where the only remedy for a false return was by a special action upon the case. But, in the Dublin case it is expressly stated by the Court that if the return had been traversed, a writ of error would lie. In the present case, a writ of error has been actually issued.

The Act of Congress gives a writ of error upon every final judgment, where the matter in dispute is of a certain value. An award of a peremptory writ of *mandamus* is a final judgment; nothing remains to be done but to execute the judgment. A peremptory *mandamus* cannot be issued after a writ of error filed. There cannot be a writ of error to part of a judgment. It issues for the whole or for nothing.

The COURT said that the judgment of the Court was for a peremptory *mandamus*. We have no jurisdiction to decide whether the defendants have a right to a writ of error. That question can be decided by the Supreme Court only. A writ of error has been issued; if we give any opinion upon the defendant's right to issue it, it will be extrajudicial. No opinion was given.

The petitioners then, respectively, sued out their several peremptory writs of *mandamus*, on the 10th of January, 1822, the ten days not having yet expired; and on the 11th, served them on the Company, who refused to obey the writs; and on the 15th, the petitioners obtained a rule upon the persons returned as elected directors of the company, to show cause immediately why an attachment should not issue against them for disobeying the writ; and the company, at the same time, obtained a rule

upon the petitioners to show cause immediately why the writs of peremptory *mandamus* should not be quashed.

Mr. Jones, for the defendants, in showing cause, contended, that the writ of error is a *supersedeas* to the judgment of this Court. The right to the writ of error is as perfect as the right to have the judgment of the Court below. There is a difference between England and this country as to prerogative. In England the writ of *mandamus* is a prerogative writ. He admits, that in England, no writ of error will lie to a peremptory writ of *mandamus*, at common law. But, in this country, it is a judicial writ, given expressly by the statute of Virginia. It is a civil, not a criminal process. *The Dublin case*, 8 Mod. 27; 2 Br. Parl. Ca. 554; 3 Ib. 178; 1 Strange, 536. The judicial authority in this country is not derived from the executive authority, as in England, but is carefully separated from it.

By the 8th section of the Act of Congress of the 27th of February, 1801, [2 Stat. at Large, 103,] "Any final judgment, order, or decree," in this Court, "where the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be reëxamined, and reversed or affirmed in the Supreme Court of the United States, by writ of error or appeal." An order for a peremptory *mandamus* is as much a final order as an order for execution upon a *scire facias* to revive a judgment. So, upon *habeas corpus*, an order, remanding the prisoner, is a final order, upon which the Supreme Court may exercise its appellate jurisdiction, as in the cases *Ex parte Burford*, 3 Cranch, 447, and *Ex parte Bollman & Swartwout*, 4 Ib. 75; and in the case of *Marbury v. Madison*, 1 Ib. the Supreme Court said they had only appellate jurisdiction in cases of *mandamus*.

In England, in a case circumstanced as this is, a writ of error will lie. It is not merely a judgment between the king and a subject. A case under the statute of Anne is a civil cause for the trial of private rights. At common law, the return was conclusive; and the only remedy for a false return was a special action upon the case. In that action damages and costs were recovered; and upon that judgment for damages and costs, a writ of error would lie both to the judgment for damages, and to the award of a peremptory *mandamus*.

In answer to the objection that the tenure of office, being only for a year, would expire before a judgment could be had upon the writ of error, it was observed that the Supreme Court would sit the next month, and would, no doubt, take up the cause out of its turn, upon being informed of the circumstances. The statute of Anne and the statute of Virginia have changed the whole ground of the action by *mandamus*. It is now a civil action to

try a private right. It would be absurd to say that the judgment for damages and costs should be reversed, and yet the order for a peremptory *mandamus* should be executed. A writ of error in an action upon the case for a false return, is a *supersedeas* to a peremptory *mandamus*. *Ruding v. Newel*, 2 Strange, 983. In the Dublin case there was no traverse. The peremptory *mandamus* was issued upon the return being adjudged insufficient by the Court; and in that case it is admitted, that where an issue has been tried, a writ of error will lie.

Mr. Swann, contra.

The object is to evade the decision of this Court until the year shall expire. A writ of error is a statutory right. If not given, in this case, by statute, it does not lie. In cases respecting mills, roads, probate of wills, &c., the appeal is given by statute only. The Virginia statute respecting *mandamus* does not give an appeal or writ of error. The preamble of that statute (22d January, 1799, p. 392,) complains of the delay which attended the old proceedings on writs of *mandamus*; and if a writ of error will lie, the object of the statute will be defeated. To prevent this delay, the statute expressly directs, that if a verdict shall be found for the person suing out the writ, "a peremptory writ of *mandamus* shall be granted without delay," "as it might have been if the return had been adjudged insufficient." The case of *Ruding v. Newel* is reported very shortly by Strange, who only says it was held to be a *supersedeas*, but does not say by whom. But, in the Dublin case, as reported in 1 P. Williams, 351, Parker, C. J., said "that a *mandamus*, since the late statute, (9 Anne, c. 20,) was in the nature of an action, special replications and pleadings therein being admitted, and costs given to either side that prevailed; and that a case had happened in the King's Bench, where judgment was given upon special pleadings, upon the late statute, for the *mandamus*, and the defendant brought error, and it was admitted error lay; yet this was held to be no *supersedeas* to the peremptory *mandamus*; for that such a construction would quite defeat the end of the statute, and prevent the officer, who was chosen annually, from having any fruit of the *mandamus*." "And King, C. J., took notice that the words of the statute were that in case judgment were given for the *mandamus*, a peremptory *mandamus* should be granted without delay." In the present case, no damages are given. The only judgment of this Court is for costs, and that a peremptory *mandamus* should issue.

Mr. Jones, in reply. It is contended that the judgment is divided, and that a writ of error to one part is not a *supersedeas* to the other. But if that could be the case, the writ of error itself and the judgment of the Supreme Court thereon, in case of re-

versal, would be wholly defeated. This Court would take from that Court the power of doing justice.

The statute of Virginia only means that such a writ shall issue after verdict in favor of the *mandamus*, as the Court would have issued if it had adjudged the return insufficient, without the intervention of a jury. The Dublin case was not a case under the statute of Anne. It was a *mandamus* at common law; and the Court in Ireland had adjudged the return insufficient, in law, and had issued a peremptory *mandamus*. What is said by C. J. Parker is only *obiter dictum*.

The Act of Congress of the 27th of February, 1801, [2 Stat. at Large, 103,] gives the Supreme Court of the United States appellate jurisdiction of every final order of this Court, where the matter in controversy is of a certain value; and if that value does not appear upon the record, that court will ascertain it by affidavits. That jurisdiction is given by an authority paramount to the State laws, and in the cases of *Wilson v. Mason*, 1 Cranch, 91, and *Young v. The Bank of Alexandria*, 4 Ib. 395, the Supreme Court of the United States decided, that, even if the State law declared that no appeal or writ of error should lie from the judgment of the inferior tribunal, it would not deprive the Supreme Court of the jurisdiction given to it by the constitution and laws of the United States.

A writ of error removes the whole record, and is a *supersedeas* if taken in proper time, which, in England, is four days; and, by the Act of Congress, ten days.

The COURT (THRUSTON, J., *contrà*,) was of opinion that the writ of error is a *supersedeas* to the writ of peremptory *mandamus*, and refused to award an attachment, and quashed the peremptory writs of *mandamus* which had been issued before the expiration of the ten days.

See 7 Wheaton, 534. The Supreme Court determined that a writ of error would lie, to reverse the judgment of this Court awarding a peremptory *mandamus*, and directed Mr. Jones to produce affidavits as to the value of the matter in controversy. But it not appearing that it amounted to \$1000, the sum required to give appellate jurisdiction to the Supreme Court from the final judgments or decrees of this Court, the Supreme Court decided that a writ of error could not regularly issue in this case, and ordered the writ of error to be quashed.

At May term, 1822, of the Circuit Court, a mandate from the Supreme Court was produced, showing that the writ of error was dismissed; whereupon the Circuit Court granted a peremptory *mandamus* to admit the petitioners, Wheelwright and others, to their seats as directors, &c.

JOHN MASON v. JOHN MUNCASTER *et al.*

The vestry and wardens of "the Protestant Episcopal Church of Alexandria," were the vestry of the Protestant Episcopal Church in the parish of Fairfax, in the ecclesiastical meaning of those terms as modified by the laws and constitution of Virginia, and the canons of the Church.

By the sale made under the decree in the case of *Taylor et al. v. Terrett et al.* the purchasers became privies to the Church, and may avail themselves of the estoppel resulting from the warranty of Daniel Jennings, the original grantor.

This was a bill in equity, praying for an injunction to stay the proceedings at law upon judgments rendered upon two promissory notes given for part of the purchase-money of the Glebe, belonging to the parish of Fairfax, which had been purchased by the complainant and Mr. Jones, at the sale made under the decree of this Court, affirmed by the Supreme Court of the United States, in the case of *Taylor et al. v. Terrett et al.* (9 Cranch, 43,) and praying, also, that the sale may be set aside for defect of title; that the notes may be given up to be cancelled, and that the part of the purchase-money which had been paid, may be decreed to be refunded, &c.

The complainant in his bill states, that he purchased upon the faith of the decree of the Supreme Court, which he supposed to be binding upon all the world. That the opinion of that Court was not printed till 1817, and that it is but very recently that his attention was directed to the reasonings in detail, upon which the decree was founded, and which he now perceives was founded upon the assumption of two facts which do not exist, viz.:—

1st. That the congregation of the Episcopal Church of Alexandria is identical with the original parish of Fairfax, as it existed prior to the assumption of jurisdiction over the District of Columbia by Congress; and that the vestry and church-wardens elected by and acting under the authority of that congregation, come in by legal and regular succession to the vestry and church-wardens of the parish of Fairfax; and

2d. That there was no other Episcopal Church in the parish of Fairfax, than that of Alexandria; and that the property belonged to the Church of Alexandria, which in this respect represented the whole parish.

The complainant further states, that there are two parties, who were not concluded by the decree, and who have a manifest interest and outstanding title, viz.:—

1. The parish of Fairfax, in Virginia, which has a right to the whole Glebe; and that many of the members of the Episcopal Church in that parish have threatened that the rights of that parish are to be prosecuted.

2. The heirs of Daniel Jennings, to whom the legal title will revert in consequence of the defeat of the capacities of perpetual and legal succession in the church-wardens, Dade and Wren, and the want of limitation by the deed, to their heirs in their natural capacity; so that the only protection of the complainant would be by setting up the estoppel in Jennings's deed, which he could not do, because there is no legal succession from the church-wardens Dade and Wren, to the church-wardens, Deneale and Muncaster, and so no privity between the complainant and the parish of Fairfax.

By a supplemental bill, the complainant asserts that there is now a regular and duly elected vestry and wardens of the Falls Church, in the parish of Fairfax, as competent to assert the rights of the Church of that parish as the defendants.

The answer of the defendants, (the vestry and church-wardens appointed by the Church in Alexandria,) asserts that they are the vestry and wardens of the whole parish, and are the regular successors of the vestry from the year 1765, and that there never has been but one vestry for both churches in the parish. It contends that the complainant had full knowledge of the state of the title at the time he purchased, and that the question of the outstanding title in Jennings was settled by the Supreme Court in the case of *Taylor v. Terrett*.

There were many exhibits, and much testimony, and the cause which came on to be heard on a motion to dissolve the injunction, which had been granted, was fully and ably argued upon the whole merits, by *Mr. Key* and *Mr. Wirt*, (the attorney-general,) for the complainant, and *Mr. Taylor*, *Mr. E. J. Lee*, and *Mr. Swann*, for the defendants.

After the argument, it was agreed that the cause should be considered as having been set for final hearing, and that the opinion of the Court should be given at the next term, when

CRANCH, C. J., delivered the opinion as follows.

After the decision of the case of *Taylor et al. v. Terrett et al.*, in the Supreme Court of the United States, the only question left open to the complainant in this case seems to be, whether the complainants in that case were the representatives of the *cestuis que trust* of the Glebe; or in other words, whether they, with George Deneale and John Muncaster, two of the defendants in that case, were, at the time of filing the bill, (22d November, 1811,) the vestry of the Protestant Episcopal Church, in the parish of Fairfax, in the ecclesiastical meaning of those terms as modified by the laws and constitution of the State of Virginia, and the canons of the Church. For, if they were, the Supreme Court having decided that that Church was the *cestui que trust*,

and that the vestry, as incident to their office as general guardians of the Church, were entitled to assert its rights and interests, and, with the assent of the minister, had a right to require a sale of the land; a sale so made by them, would constitute the purchasers privies to the Church; and would enable them to avail themselves of the estoppel resulting from the warranty of D. Jennings, the original grantor; and they would be in no danger from the outstanding title in the heirs of that grantor, nor from the claims of that portion of the parishioners, (if any such there be,) who reside in the county of Fairfax.

After the Revolution, when the Protestant Episcopal Church ceased to be the Established Church in Virginia, and the vestries ceased to have the power to tax their respective parishes, a Protestant Episcopal parish, in the ecclesiastical meaning of those terms, consisted only of those inhabitants of a territorial parish, who were members of the Protestant Episcopal Church. The word parish, therefore, in its ecclesiastical sense in regard to the Protestant Episcopal Church of Virginia, was synonymous with the phrase, "Protestant Episcopal Church in the same parish;" or, in other words, a parish, in its ecclesiastical sense, in Virginia, after the Revolution, meant the Protestant Episcopal Church in a parish. And the Protestant Episcopal Church in a parish consisted of the members of that Church who resided within the territorial parish.

The right to the Glebe in question, is decided by the Supreme Court to be in the Protestant Episcopal Church, in the parish of Fairfax. No individual member of the Church has any interest therein, but in right of his Church. It is a social, not an individual right. The Protestant Episcopal Church in the parish of Fairfax is recognized by the Act of Virginia of 1786, as a religious society capable of having property, and belonging to a sect which could make, or had made rules for regulating the appointment of trustees. In May, 1787, the Convention of the Protestant Episcopal Church, of Virginia, ordained rules for that purpose, which rules are recognized by the Act of 1788, which declares that the trustees of the Protestant Episcopal Church, (appointed according to their rules,) and their successors shall be considered successors of the former vestries, and have the same powers.

The repeal of the Acts of 1786 and 1788, did not affect the right of the sect (that is, the Convention,) to make such rules, because the right was not given by those acts. They are only evidences of a preëxistent right.

The vestrymen, who were complainants in the bill of *Taylor et al. v. Terrett et al.* were duly appointed according to the rules

of their sect, (that is, the canons of their church.) There is no evidence of the particular manner in which they were chosen, but it is certified by the church-wardens, that they were duly elected to serve the parish as vestrymen for the next three years; and the fact must be admitted, unless the contrary be proved. The only remaining question then, is, what parish were they to serve? The complainant's counsel say, not the parish of Fairfax, but the Alexandria congregation, or as they call themselves in the vestry-book, "The Protestant Episcopal Church of Alexandria," which had abandoned the parish of Fairfax, and set itself up in 1803, as a separate religious society. And they give this answer to the question, because they say there are no entries in the vestry-book from the 19th of April, 1799, to the 2d of April, 1804; because on the 15th of June, 1803, there was a new agreement entered into by certain subscribers to the church; because the vestry which was elected in 1804, and all the subsequent vestries, styled themselves the vestry of the Protestant Episcopal Church at, or in, or of, Alexandria, and never called themselves the vestry of the parish of Fairfax, as all the former vestries did; because in two or three instances, in the minutes of the proceedings of the vestry, they speak of the parish of Alexandria; and because the vestry suffered the Falls Church to go to ruin.

The COURT, however, is of a different opinion. We think the parish, mentioned in the minutes of the election of the vestry in 1810, was the parish of Fairfax; 1st. Because the entry is made in the vestry-book of the parish of Fairfax.

2. Because there was no other parish which they could serve as vestrymen.

3. Because all the vestries chosen since 1803, have uniformly held, and claimed to hold the Glebe, and the church, and all the church-property belonging to the Protestant Episcopal Church in the parish of Fairfax, in the right of that Church, and as representing the whole Protestant Episcopal Church in that parish, and have exercised all the rights of property over the same, which a vestry could exercise.

4. Because when the congregation at the Falls Church ceased to exist, the Alexandria congregation became the only Protestant Episcopal congregation in the parish, and constituted the whole Protestant Episcopal Church in the parish. All the Protestant Episcopal inhabitants in the parish, who had a right to vote at all for a vestry, had a right to attend the election held in April, 1810, and to vote for vestrymen; and if they did not, it was their own fault.

5. Because there is no evidence to satisfy us that the Alexandria congregation abandoned the parish of Fairfax, or any of

their parochial rights, or ever formed themselves into a separate religious society.

The omission of entries in the vestry-book, is accountable for without supposing any such abandonment. There are twelve blank pages left between the minutes of 1796 and 1804, from which circumstance, a strong inference may be drawn that the person who left those blank pages supposed there were minutes of proceedings which had not been entered in that book; and, in fact, a rough minute-book has been produced in evidence, containing the minutes of several meetings of the vestry in 1796, 1798, and 1799, which ought to have been entered in those blank pages. It also appears in evidence that the minutes of the proceedings of the vestry were sometimes taken upon loose sheets; and that there was no time between 1796 and 1804, when there was not a regular vestry.

There was a meeting of the vestry on the 16th of April, 1799, at which Mr. William Fitzhugh was elected a vestry-man, in the place of Mr. Hunter, who had resigned. As this meeting was after Easter Monday of that year, (which happened on the 25th of March,) and that being the day and year when a vestry ought to have been chosen, a strong presumption arises that a vestry was chosen in March, 1799, although no minute of such an election is preserved.

It is true that the election of the vestry in 1804 (of which there is an entry in the book) raises a strong presumption that no vestry was chosen in 1802, when, regularly, it ought to have been chosen; for, the elections being triennial, if a vestry had been elected in 1802, it would not have been necessary to choose one in 1804; the old vestry, however, had a right, under the canons of the church, to act until a new vestry should be chosen. Under such circumstances, a single omission to choose a vestry, at the regular day, cannot justify an inference that the congregation of Alexandria had abandoned their parochial rights.

The agreement of the 15th of June, 1803, which is fastened into the vestry-book with wafers, (evidently for its preservation,) instead of proving an abandonment of parochial rights, and the formation of a new and separate religious society, justifies a strong contrary inference. Its sole object is to raise a fund (by renting the pews of the church) for the support of the Rev. Thomas Davis, who was regularly inducted as rector of Fairfax parish in the year 1792, and continued to be the rector of that parish until October, 1806; during all which time the right of the church to the glebe was vested in him as *persona ecclesiae*. The subscribers to that paper agreed to hire certain pews at certain prices, and pay £1000 per annum to Mr. Davis, the residue to be ap-

plied to the use of the church. The resolutions of the 18th of November, 1803, which are written on the page next after the agreement of the 15th of June, 1803, have no other object than the agreement; and afford no evidence either of the intention to abandon the parish, or to form a new religious society; but do, with the agreement, show the strongest evidence of a determination to adhere to the parish, and to support its rector and its church.

The counsel for the complainant seems to rely much upon the circumstance that the vestry of 1804, and all the subsequent vestries style themselves the vestry of the Protestant Episcopal Church at, or in, or of Alexandria, and never call themselves the vestry of the parish of Fairfax, as all the former vestries did.

This circumstance is, at most, only evidence that they did not think themselves entitled, or did not choose to call themselves by that name. There is no evidence of the reason why they did not think themselves so entitled, or why they did not choose so to call themselves. One thing, however, is certain, namely: that it was not because they had abandoned their parochial rights. And if it was not evidence of an abandonment of those rights, it does not seem to be material to the complainant what were the motives of the vestry. The omission to call themselves by their right name did not work a forfeiture of the rights of their constituents; nor did they lose their rights by their ignorance of them. Their constituents were all those who had a right to vote at that election; and consisted of all the members of the Protestant Episcopal Church in the parish of Fairfax who had a right to vote at all elections of vestrymen. If the vestry was the real representative of the Protestant Episcopal Church in the parish of Fairfax, it is immaterial by what name they called themselves.

Although it may not be necessary in this case to ascertain what was the reason which induced the vestry of 1804, and the succeeding vestries to call themselves the Protestant Church of Alexandria, and to omit to call themselves the vestry of the parish of Fairfax, as their predecessors had done, yet it may be satisfactory if we can account for that circumstance without the necessity of an inference that they had abandoned their parochial rights.

They might have supposed that the Protestant Episcopal Church of Virginia had been broken down by the acts of 1799 and 1802, and therefore felt a reluctance to take a name which should imply a connexion with the church. They might have erroneously supposed that the best way of preserving the rights of the Protestant Episcopal Church in Fairfax parish, was to have as little apparent connexion with it as possible. They knew that the Alexandria congregation was the only remaining Protestant Epis-

copal congregation in the parish, and really constituted the whole of the Protestant Episcopal Church in that parish; and as almost all the members of that congregation, and the whole glebe were in that part of the parish of Fairfax which had been ceded to the United States, they might have erroneously supposed that there would be an impropriety in calling themselves the vestry of the parish of Fairfax. There was also an ambiguity in the words church, and parish, which might tend to confuse and perplex their ideas on the subject. They might have supposed that as the only remaining Protestant Episcopal congregation in the parish worshipped in Alexandria, they might with more propriety be called the Protestant Episcopal Church of Alexandria, than the Protestant Episcopal Church of Fairfax parish; and as the civil jurisdiction of part of the territorial parish of Fairfax had been ceded to the United States, they might not have been aware that the ecclesiastical parish still remained entire. Supposing it to be divided, they might have thought it would be improper in them to take the name of the entire parish. The circumstance, also, that the county, as well as the parish, bore the name of "Fairfax," tended to increase the confusion of ideas on the subject. The circumstances, in which they found themselves, were new. Their ideas, at first, must have been confused and unsettled as to the whole extent of their rights; but it seems clear, that from the first, they claimed the exclusive right to all the church property, upon the ground that they constituted the whole of the Protestant Episcopal Church in Fairfax parish. It is immaterial by what name they called themselves. All their acts show that they claimed and exercised all the ecclesiastical rights of that parish. This view of the subject explains, and gives consistency to all their acts.

In three instances, namely, on the 20th of October, 1809, and the 18th and 24th of February, 1810, the minutes of the vestry speak of obtaining a rector for the parish of Alexandria. This was, no doubt, an inaccurate expression, and arose from the same confusion of ideas which has been already mentioned.

It was strongly urged by the complainant's solicitor, that the complainants in the case of *Taylor et al. v. Terrett et al.* could not avow themselves to be the vestry of the whole parish of Fairfax without confessing themselves to be guilty of sacrilege in suffering the building commonly called the Falls church to go to ruin. But surely it cannot be called sacrilege to suffer an useless building to go to decay. When the vestry ceased to have the power to tax the parish, its obligation, to keep the churches in repair, ceased also. They could only be kept in repair by voluntary contributions. The Falls church was erected solely

Talbot v. McPherson.

for those members of the church who lived in its vicinity. It was for them to keep it in repair; and if they did not, the vestry was not responsible. But the hypothesis of the complainant's counsel would charge the vestry with a much heavier sin than that of not repairing a useless church. It would charge them with knowingly seizing upon, and converting to their own use, or the use of their constituents, property to which they had no right. The weight of this argument, therefore, turns against the complainant.

6. We are of opinion that the Alexandria congregation did not separate themselves from the parish of Fairfax, and establish a distinct separate religious society, because they could not do so consistently with the canons of the church then in force.

Upon the whole, then, we are of opinion that the complainants in the bill of *Taylor et al. v. Terrett et al.*, together with George Deneale and John Muncaster, two of the defendants in that case, were the vestry of the Protestant Episcopal Church in the parish of Fairfax, in the ecclesiastical meaning of those terms, as modified by the laws and constitution of Virginia and the canons of the church, and may avail themselves of the estoppel resulting from the warranty of Daniel Jennings, the original grantor; and therefore the complainant has failed to support his bill; which must be dismissed with costs.

The complainant appealed to the Supreme Court of the United States, where the decree of this Court was affirmed. See 9 Wheat. 445.

ELISHA TALBOT v. JOHN MCPHERSON *et al.*

A contract to deliver 300 hides, then in the vat, to the plaintiff, as security to indemnify him for his responsibility for a debt due by the defendants, which has since been satisfied, will not constitute a lien upon the hides, in favor of the plaintiff to indemnify him for his responsibility for another debt of the defendants, for which the plaintiff is liable, where the rights of a third person have intervened.

THIS was a bill in equity by Elisha Talbot against John McPherson and Daniel McPherson, carrying on the trade of tanning, under the firm of John McPherson & Son, and one Tuley, the foreman of John McPherson & Son.

The original bill was filed on the 15th of April, 1819, stating that the plaintiff had purchased of John McPherson & Son 300 hides in the vats, and still remaining there; and that the said J. McPherson & Son had received, for them, a full and valuable consideration, "in other words have been fairly paid for them," and he exhibits their bill and receipt, which is in these words:

Talbot v. McPherson.

“Elisha Talbot bought of John McPherson & Son, 300 hides sole leather at eight dollars, in the vats, \$2,400. Received payment, John McPherson & Son. Alexandria, 4 mo. 6th, 1819.”

The bill further states that the plaintiff believes J. McPherson & Son to be insolvent. That he had demanded the hides of the defendant Tuley, who is the foreman of the tan-yard, and has possession of the hides, and refuses to deliver them to the plaintiff. That Tuley has not sufficient property to answer in damages. That the plaintiff fears that the defendants will remove, or sell, or dispose of the hides, and that he has no means of obtaining payment for them, as the defendants are insolvent. On the 10th of November, 1819, the plaintiff filed his supplemental bill, stating that he had obtained sixty-eight of the hides, but that the residue had been sold to one D. Dougherty, who has taken possession of them, but had not paid for them; that he believes the sale was made by one John McPherson, junior, and that it is a contrivance to evade the injunction which had been granted upon his original bill.

Both bills prayed that the hides might be specifically delivered to the plaintiff.

The answer of John McPherson & Son, by Daniel McPherson, avers that neither he, nor the firm of John McPherson & Son ever received any compensation for the hides, but that the bill of sale was given as collateral security to indemnify the plaintiff against a debt due to one Silas Wood on a forthcoming bond, in which this plaintiff was bound as surety for this defendant; which debt has been discharged by an execution on this defendant's property, a part of which consisted of the hides in question.

John McPherson, Jr. who was made a defendant by the supplemental bill, avers that he was a creditor of John McPherson & Son, to the amount of \$3,201.68, who in April, 1818, engaged to deliver to him one thousand Spanish hides, manufactured into merchantable sole-leather. That in April, 1819, Daniel McPherson delivered to him whatever hides then remained in the tan-yard in part liquidation of his claim, and that he authorized Tuley to dispose of them as his agent. That on the 24th of July, 1819, this defendant sold them to D. Dougherty for \$4,500, and they were delivered to him by Tuley.

Daniel Dougherty answered to the same effect. The payment of the debt to Silas Wood, by the sale of the property of Daniel McPherson under the execution against him, was proved by the deposition of the deputy marshal.

There were many depositions taken respecting John McPherson, Junior's circumstances, and his ability to become the creditor of J. McPherson & Son, to the amount of \$3,000. The cause,

Talbot v. McPherson.

upon final hearing, was argued by *Mr. Mason* and *Mr. Jones*, for the plaintiff, and by *Mr. Swann* and *Mr. Wise*, for the defendant.

CRANCH, C. J., delivered the opinion of the Court.

(THRUSTON, J., absent.)

The questions arising in this case are, —

1. Has the plaintiff made out a title to the three hundred hides, for the specific delivery of which he asks a decree ?

2. If he has not, has he proved such a contract for the sale and delivery of those hides as constitutes a lien upon them in the hands of Dougherty, who was a purchaser *pendente lite* ?

3. If the plaintiff has made out such a title, or proved such a contract, can the Court decree a specific delivery of the hides ?

1. The bill avers that the plaintiff purchased three hundred hides in the vats, but does not aver that he paid for them. It only avers that John McPherson & Son "had received a full and valuable consideration for them; in other words, had been fairly paid for them." It does not aver that any consideration moved from the plaintiff.

The defendant, Daniel McPherson, denies (in direct repugnance to the allegation of the bill) that he, or any of the firm of John McPherson & Son, ever received any compensation for the three hundred hides; and avers that the bill of sale (or more properly the bill of parcels) was given to the plaintiff merely to indemnify him against the debt for which he was bound to Silas Wood & Co.; which debt he avers has been satisfied out of his own property.

This statement of the defendant, so far as it denies the allegation of the bill as to consideration, is evidence conclusive, unless contradicted by two witnesses. The plaintiff has produced none. It is true that Thomas Janney proves that he has a judgment against the plaintiff, as surety for the defendant, John McPherson & Son, for \$1,280.25, with interest from the 10th of September, 1816, and that the plaintiff had paid \$598.69 in part, and was liable for the balance. But there is no evidence to connect the sale of the hides with that transaction. If the plaintiff had possession of the hides, a court of equity would not, perhaps, compel him to give them up to the defendants, until they should indemnify him against that judgment; but the plaintiff's liability alone, without possession, and without a specific contract connecting the hides with that liability, will not authorize a court of equity to take them out of the hands of a third person.

The allegation of the defendant that the bill of sale was given to indemnify the plaintiff against the claim of Silas Wood & Co. is corroborated by the fact that the marshal, with the consent of the plaintiff, levied that execution on those hides, and sold a part of them to satisfy that claim; and the marshal's deposition proves

 Harper v. Dougherty.

that the residue of that claim was paid by other property in the tan-yard, or in the currying-shop.

There having been no consideration paid, by the plaintiff, for the hides, and the purpose, for which the bill of parcels was given, having been answered, there does not appear to be any such title made out by the plaintiff, nor any such contract proved as will authorize a court of equity to decree a specific delivery of the hides, nor any other relief. It is, therefore, unnecessary to decide the two other questions.

We think the bill must be dismissed.

Bill dismissed, with costs.

SAMUEL HARPER v. DANIEL DOUGHERTY *et al.*

To constitute a valid sale so as to change the property in a chattel, there must be a certain price agreed upon, and the thing must be delivered, except in the case of a vessel at sea.

The answer, so far as it is responsive to the allegations in the bill, is conclusive evidence, unless contradicted by two witnesses.

Quære, whether a court of equity can or ought to decree the specific execution of a contract for the sale of personal goods in any case whatever.

BILL in equity by Samuel Harper against Daniel Dougherty, John McPherson, Daniel McPherson, John McPherson, Jr., Thomas Tuley, and Nathaniel S. Wise. It states that the plaintiff, in March, 1819, purchased of John McPherson & Son, (who were the said John McPherson and Daniel McPherson, carrying on the business of tanning leather under the firm of John McPherson & Son) a quantity of sole-leather to the amount of \$2,243.99 then lying in the vats; that it was not delivered because it was not entirely in a state to be removed, and J. M. & Son, were by agreement to complete the leather and deliver it to the plaintiff. That the sale was *bonâ fide*; and that J. M. & Son received a valuable and full consideration for the same. That they afterwards failed in business. That John McPherson, Jr. set up a claim to the leather and took possession of it. That he is a man of desperate circumstances, and entirely without property, or the means of paying the plaintiff. That Daniel Dougherty, knowing of the plaintiff's claim, purchased the leather of John McPherson, Jr. but has not paid for it. That J. M., Jr. refuses to deliver up the leather to the plaintiff. The bill then prays an injunction, and that the money in Dougherty's hands may be applied to pay the plaintiff; and for general relief. A supplemental bill states that Dougherty had conveyed the leather by a deed of trust to N. S. Wise to secure the payment of his (Dougherty's) two notes to J. M., Jr. for \$1,750 each, and prays that Wise may be made a defendant, and that the plaintiff may

have the benefit of the trust, and that the property may be sold to pay the plaintiff's claim.

The answer of Daniel McPherson denies that he or any of the firm of J. M. & Son, ever made the sale of sole-leather to the plaintiff, which is charged in the bill; or ever entered into any contract with the plaintiff whereby this defendant or the said firm became bound to deliver to the plaintiff any quantity of sole-leather.

The answer of Dougherty admits that he had notice of the plaintiff's claim when he purchased the leather of J. M., Jr. The answer of John McPherson, Jr. states that J. M. & Son, being indebted to him in the sum of \$3,201.68 in April, 1818, engaged to deliver him one thousand Spanish hides manufactured into merchantable sole leather. That in April, 1819, Daniel McPherson gave him possession of whatever hides then remained in the tan-yard in part liquidation of his claim for one thousand dollars, and that he sold them to Dougherty for \$4,500, and they were delivered to him by Tuley by the authority of this defendant.

Upon the final hearing, the cause was argued by *Mr. Mason* and *Mr. Jones*, for the plaintiff, and *Mr. Swann* and *Mr. Wise*, for the defendants.

May 7th, 1822, CRANCH, C. J., delivered the opinion of the Court. (THRUSTON, J. absent.)

The questions arising in this case are, —

1. Was there a complete sale of the leather, so as to change the property, and vest it in the plaintiff? If not, then

2. Was there such a contract for the sale and delivery of the leather as a court of equity will enforce? If not, then

3. Whether there was any contract which gave the plaintiff a specific lien on any, and what quantity of leather.

4. If there was any such sale or contract with Daniel McPherson, or with J. M. & Son, then the title of J. McPherson, Jr. must be examined, because he dates his title in April, 1818, one year before the plaintiff's.

5. If the plaintiff is entitled to any decree in his favor, shall it be for a specific delivery of the leather, or for as much money in Dougherty's hands as will satisfy the plaintiff's claim?

1. To constitute a valid sale of a chattel, so as to change the property, there must be a certain price agreed upon, and the thing must be delivered; except in the case of a vessel at sea, when the transfer is made by the grand bill of sale.

In the present case the sale is expressly denied by the answer, which is evidence, and conclusive, unless contradicted by two witnesses to the same point. And it is contended that this answer is contradicted by two witnesses; but this will be considered hereafter, if necessary.

By the plaintiff's own showing in the bill, no price was fixed to the leather, and it was not delivered. If, therefore, there was any contract about the leather, it was not such a sale as transferred the property to the plaintiff.

2. Was there such a contract for the sale and delivery of the leather as a court of equity will enforce?

This question may be divided. 1st. Was there a contract for the sale and delivery of the leather? and 2d. If there was, can a court of equity decree a specific performance?

First; was there a contract for the sale and delivery of the leather? The bill states the affirmative. The answer positively denies it; and the plaintiff has produced no evidence of such a contract. It is true that Mr. Rinker and Mr. Little testify that Daniel McPherson admitted that the hides which J. M., Jr. claimed were the identical hides which he (D. M.) had sold to the plaintiff; and Mr. Rinker adds, that he understood D. M. as admitting distinctly that he had sold the hides as charged by the plaintiff, and as denying that they were actually transferred to J. M., Jr. The latter circumstance is not noticed by Mr. Little; but he says that D. M. "added that he did not, at the time, intend to deliver them to said Harper."

It may be observed, that these affidavits appear to have been taken *ex parte*, and without notice to the defendants. There was no cross-examination. The point of the question, which appears to have been put to D. M. in the presence of the committee of the monthly meeting, was respecting the identity of the hides, and not the sale, or the terms of the sale. Neither the price nor the quantity of the leather was mentioned; nor is there the least evidence on that subject. The sale which was spoken of at the meeting might have been the sale which is stated in the defendant D. M.'s answer, which was abandoned, and which is admitted in the plaintiff's affidavit. Admitting, however, that the answer of D. M. is contradicted by two witnesses, yet the plaintiff has failed to prove the terms of the contract. There is no evidence of the quantity of leather sold, nor of the price; nor of the amount due to the plaintiff. What is there, then, for the Court to enforce? It cannot make contracts for the parties; nor can it enforce contracts not proved.

3. There is no evidence of any other contract, which gave the plaintiff any specific lien on any quantity of leather. The plaintiff having failed to show any contract which would entitle him to relief in a court of equity, it becomes unnecessary to inquire into the validity of the title of John McPherson, Jr. or of Daniel Dougherty; or to consider the question whether a court of equity can, or ought, in any case, to decree the specific execution of a contract for the sale of personal goods. Bill dismissed, with costs.

CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1822, AT WASHINGTON.

ROBERT TURNER *v.* JOHNSON & GREEN.

If a person who has made an improvement upon a machine, already patented by another, take out a patent for the whole improved machine, the patent is void; and if knowingly sold as a valid patent, the vendor cannot recover upon a note given for the purchase-money.

ASSUMPSIT, on a promissory note for five hundred dollars.

Mr. Wiley, for the plaintiff. *Mr. Key*, and *Mr. Dunlop*, for the defendant.

The COURT (*nem. con.*) instructed the jury, at the prayer of the defendant's counsel, "that if they believed from the evidence that the plaintiff sold to the defendant a patent right including an original invention which was known to the plaintiff to have been previously patented to another, together with his, the plaintiff's improvement on such original invention, for which improvement only the plaintiff was entitled to a patent, and that the defendant bought such patent right ignorant of the original invention having been previously patented to another, and with a belief that he would have an exclusive right to the whole machine, and that the note in question was given as part consideration of such purchase, then it was a fraud on the defendants, and the note void in law."

Verdict for defendant.

ROBERT BRENT'S EXECUTORS *v.* ANDREW COYLE.

According to the usage of the banks in the District of Columbia, it is not necessary to demand payment of a note discounted at any of the said banks until the day after the last day of grace.

The discontinuance of a cause, under the Maryland Act of 1785, c. 80, for want of an appearance or proceeding for two terms after the suggestion of the death of a party, is cured by the subsequent appearance, trial, and verdict.

ASSUMPSIT, against the indorser of a promissory note discounted at the Patriotic Bank of Washington, for the accommodation of the maker. No demand was made of payment on the maker until the day after the last day of grace.

Upon the trial, the COURT (THRUSTON, J., absent,) at the prayer of the plaintiff's counsel, instructed the jury, "That if they should believe from the evidence that it was the uniform practice and usage of the Patriotic Bank, and all the banks in the county of Washington since their respective establishment, to demand payment of the makers of the notes discounted by the said banks on the day after the last day of grace, and that this practice and usage were known to the defendant, and that he indorsed the said note with a knowledge of the said practice and usage, and for the purpose of being discounted at some one of the said banks, to renew, or to be substituted for, another note or notes before that time discounted by such bank, and with the understanding and expectation that if the said note should not be duly taken up at maturity, it was to be proceeded with by such bank, or by the holder of such note according to the practice and usage aforesaid, by being presented for payment and demanded of the maker on the day after the last day of grace as aforesaid, and not sooner; and that the note, now in suit, was so proceeded with, presented, and demanded, then the plaintiffs are not precluded from recovering in this action upon the said note by reason of the omission to demand payment of the maker of the said note before the said day after the last day of grace as aforesaid."

To this instruction the defendant took a bill of exceptions, and obtained a writ of error, but did not prosecute it, as the plaintiffs agreed to stay execution until the cases of *Renner v. The Bank of Columbia*, and *Magruder v. The Bank of Washington*, which were decided in this Court, at this term, upon the same question of demand and notice, should be decided in the Supreme Court. In those cases, (9 Wheat. 581, and 598,) the judgment of this Court was affirmed.

After the verdict in this cause, the defendant's counsel, *Mr. Ashton*, moved in arrest of judgment, "Because this suit was instituted in June term, 1818, and at June term, 1820, the death of Robert Brent, the original plaintiff was suggested, and there was no appearance entered for the executors until after October term, 1821, in consequence of which the said suit ought to have abated."

The Maryland Act of 1785, c. 80, § 1, provides that upon the death of a party, "in case there be no appearance or proceeding by either party, in any case aforesaid, before the tenth day of the second court after the death shall be suggested, then the action shall be struck off the docket and discontinued."

Mr. Ashton, for the defendant, contended that the action was, by the statute, actually discontinued for want of appearance, and further proceeding before the tenth day of the second term after

the suggestion of the death of the plaintiff, and the cause ought not to have been brought forward on the docket.

Mr. Law and *Mr. Randall*, *contrà*, contended that the Act of 1785, c. 80, applies only to cases where there is no appearance on either side, the previous clauses of the act having provided for the case of the death of one of the parties. The words are, "in case there be no appearance or proceeding by either party;" but here there has been constantly an appearance of one party and a proceeding, that is, a continuance at the request of the defendant.

But if there was a legal discontinuance, the objection comes too late after verdict. The defendant, by going to trial has waived the discontinuance. By the statute of *jeofails* the defect is cured by the verdict. After verdict, judgment shall not be arrested on account of a discontinuance. 1 Com. Dig. 460, 462, Tit. "Amendment;" 5 Ib. 538, Tit. "Pleaders," S. 47; Tid. 835, 888.

The COURT (*THRUSTON, J., contrà*), informed *Mr. Ashton* that the construction given by him to the Act of 1785, c. 80, was that which had been uniformly given by the Courts of Maryland, and requested him to confine his argument to the question whether the discontinuance can be taken advantage of after verdict.

Mr. Ashton and *Mr. Jones*, in reply, contended that the writ was abated, and therefore no judgment could be rendered. 5 Com. Dig. 537; Salk. 77. After the death of *R. Brent*, the cause could not be continued by consent, and the Court could not continue it beyond the tenth day of the second term after the suggestion of the death.

The COURT, after several days' consideration, was of opinion (*nem. con.*) that the discontinuance was cured by the verdict.

A writ of error was taken, but not prosecuted.

THE BANK OF WASHINGTON v. REYNOLDS.

If the maker of a note die before the note becomes payable, a demand of payment made upon his widow, at the last place of his abode, is *prima facie*, a sufficient demand to charge the indorser, there being no evidence that there was an executor or administrator; but if there be actually an executor or administrator, the demand must be made upon him; the burden of proof, however, that there was an executor or administrator, lies on the defendant.

THE defendant was indorser of *J. Huddleston's* note at sixty days. *Huddleston* died before the note became payable. The notary on the day after the third day of grace, called at his last dwelling place and demanded payment of his widow, who replied

she had nothing to do with the settlement of the estate. The notary did not know whether there was an executor or administrator; the defendant having offered no evidence that there was any administration upon the estate.

The COURT (MORSELL, J., *contrà*,) was of opinion, that this was a sufficient demand.

The COURT, upon the trial, on the motion of the plaintiff's counsel, instructed the jury, (*nem. con.*) that if they should believe from the evidence that Mr. Reynolds, the defendant, had been several years a resident of the city of Washington, previous to the protest of the note in question, and that several previous notes, upon which he was indorser, had been protested upon demand made on the day after the third day of grace, and had been renewed by his indorsement upon notice given to him on the day after the third day of grace, and that such demand and notice were, according to the long existing usage and practice of the bank and its customers; the jury may infer from these facts, that the defendant had a knowledge of such usage in the said bank at the time he indorsed the note, and that he assented to such usage.

The defendant then offered evidence that when the note became payable, there was an executor of the maker, qualified to act, and residing in this city.

The COURT (THRUSTON, J., *contrà*,) was of opinion, that the plaintiffs were bound to inquire for the executor and demand payment of him.

Verdict for the plaintiffs.

The defendant's counsel moved for a new trial, because the verdict was against the instruction of the Court upon the point of law.

But the COURT refused to grant it.

NICHOLLS v. WARFIELD.

It is not competent for the plaintiff to give evidence of the defendant's acknowledgment of the receipt of the goods mentioned in a certain account which had been delivered to the defendant, without having first given notice to the defendant to produce the account.

The COURT (THRUSTON, J., absent,) refused to permit the plaintiff to give evidence of the defendant's acknowledgment of the receipt of goods charged in an account which had been delivered by the witness to the defendant, without having first given the defendant notice to produce it, although the witness held in his hand a copy of that account.

Lapeyre, Farrowith, & Co. v. Joseph Gales, Jr.

THE MAYOR, RECORDER, &c. of Georgetown, for the use of the
New England Glass Company v. JOHN W. BAKER, surety of
John Peabody, auctioneer.

An auctioneer's bond given to the Corporation of Georgetown, by its corporate name, is void; it should be given to the mayor only, as required by the by-law. The license must be under the corporate seal.

DEBT against the surety in an auctioneer's bond, taken under a by-law of Georgetown, for licensing auctioneers, which requires them to give bond to the mayor, and directs that the licenses shall be granted under the seal of the corporation. In this case, the bond was given to the corporation by its corporate name, and the license was without a seal.

The COURT (*nem. con.*) decided that the bond was void, because given to the corporation, and not to the mayor, as required by the by-law. And that as the bond was taken prospectively, before the license was granted, and as the license was not granted under the corporate seal, as required by the ordinance, the auctioneer never was such an auctioneer as was contemplated by the bond, although he continued to act as such through the whole year.

Verdict for the defendant.

The plaintiff's counsel took a bill of exceptions, but no writ of error was prosecuted, although there were several suits, for considerable sums depending upon the same questions.

LAPEYRE, FARROWITH, & CO. v. JOSEPH GALES, JR.

In a declaration upon a bill of exchange payable to Lapeyre, Farrowith, & Co., all the persons composing the firm must be named, with an averment that they were joint partners, or joint traders, under the name and firm of Lepeyre, Farrowith, & Co., otherwise the bill of exchange cannot be received in evidence.

ASSUMPSIT against the acceptor of an inland bill of exchange, payable to Messrs. Lapeyre, Farrowith, & Co., or order.

The declaration stated that the defendant was attached to answer John Lepeyre, Andrew Farrowith, Emanuel Burckle, Lawrence Faures, and Daniel H. Mandeville, in a plea of trespass on the case; whereupon the said plaintiffs by John Lookerman, their attorney, complain, &c., stating that the bill was drawn by one William M. Sawyer, upon the defendant, payable to the said plaintiffs, or order, &c., and that in consideration thereof, the defendant promised to pay to the said plaintiffs, the sum in the bill specified, &c.

On the trial, *Mr. Wallach*, for the defendant, objected to the bill of exchange being given in evidence, because the declaration does not aver that the plaintiffs were joint merchants, or traders, trading under the name or firm of *Lapeyre, Farrowith, & Co.*, nor that the bill was made payable to the plaintiffs by that name.

The COURT (*THRUSTON, J.*, absent,) rejected the bill.

The plaintiff had leave to amend; a juror was withdrawn, and the defendant confessed judgment.

CORNELIUS WELLS v. SOLOMON HUBBARD.

A constable is not justified in breaking into a dwelling-house, by a warrant from a justice of the peace to search for goods clandestinely removed by a tenant to deprive his landlord of his remedy by distress for rent.

TRESPASS quare clausum fregit. The defendant, who was a constable, justified under a warrant from a justice of the peace to search for goods clandestinely removed by *Sears*, tenant of *Johnston*, within thirty days after the expiration of the term, under the Stat. of 11 Geo. 2, c. 19.

Mr. Ashton, for the defendant, cited *Bradby on Distresses*, 14, 15. And the Stat. 11 Geo. 2, c. 19, which was in force in Maryland, and adopted as the law of this county, by the Act of Congress of the 27th February, 1801, [2 Stat. at Large, 103,] "concerning the District of Columbia."

Mr. Jones, for the plaintiff. That statute does not authorize a warrant. The landlord, or his bailiff, by the first section is authorized to seize the goods wherever found, within thirty days after removal; and by the 7th section, to break open and enter any dwelling house where the same shall be suspected to be concealed, first calling the constable of the place to his assistance, and making oath before some justice of the peace, of a reasonable ground to suspect that such goods are therein, and if found, may seize the goods for the arrears of rent, as if found in any open place.

Mr. Ashton, in reply. The magistrate had jurisdiction to issue the warrant, and the constable was bound to obey it.

The COURT (*THRUSTON, J.*, absent,) was of opinion, that the constable was not, as constable, justified by the warrant, because the justice had no jurisdiction to grant such a warrant. That the right to break open the doors, was the right of the landlord, or his bailiff, as such. That the constable is required to be present only to keep the peace, and that, even then, if the goods be not found in the house, the constable who breaks open the doors, is liable to an action of trespass. Verdict for plaintiff.

UNITED STATES v. JOHN POCKLINGTON.

The confession of a prisoner, under hopes excited by the examining magistrate that his punishment would be thereby mitigated, cannot be given in evidence against him.

THE prisoner was indicted for breaking open the storehouse of R. & R. in Georgetown. He was examined before the mayor of that town, who informed him that one of the party had confessed a part of the charge; and that if he would confess candidly the truth, he would represent his case to the Court, and it was probable his punishment might be thereby mitigated.

THE COURT refused to permit his confession, made under those circumstances, to be given in evidence.

Verdict, not guilty.

THE CORPORATION OF WASHINGTON v. WALKER.

The collector of city taxes who was appointed and gave bond in June, 1816, and resigned in October, 1816, was liable upon that bond for all collections of taxes made by him after the date of the bond and before his resignation, although such collection consisted of arrearages of taxes due in former years.

DEBT on a collector's bond. There were several breaches assigned in not paying over the money collected. The bond was dated in June, 1816, and the defendant resigned his office in October, 1816, before the tax list of that year had been delivered to him. He had been collector for several preceding years.

Mr. Law and *Mr. Key*, for the plaintiffs, contended that as the defendant had been collector in preceding years, his sureties in this bond are liable for collections made in former years.

But the COURT (MORSELL, J., *contra*,) decided that the defendant is liable upon this bond, dated in June, 1816, for all collections of taxes made by him, after the date of the bond, and before his resignation in October, 1816, although such collections consisted of arrearages of taxes due in former years; the by-law of 1812 having expressly made it the duty of every new collector to collect such arrearages; and as the defendant was collector of the preceding year it was not necessary that he should have been furnished by the register with a new list of arrearages, because the defendant must have himself known what the arrearages were.

THRUSTON, J., was of opinion that this bond covers all moneys in the defendant's hands at any time after its date.

UNITED STATES v. BOOK *alias* BUSH.

An acquittal upon an indictment for forging an order with intent to defraud John Lang, is no bar to an indictment for forging the same order with intent to defraud William Lang.

An order in these words, "Sir, Please let the bearer have one pair boots, Yours &c., Levin Stewart," is a draft for the delivery of goods, within the Act of Maryland, 1799, c. 75, § 2.

INDICTMENT for forging and uttering the following order :
"Sir, — Please let the bearer have one pair boots, Yours &c.,
Levin Stewart. Mr. Lang, Geo'town, December 31, 1821,"
with intent to defraud one William Lang.

The prisoner had been indicted before, at the present term, for forging and uttering the same order with intent to defraud one John Lang; but it appearing upon the trial that the name of the person intended to be defrauded was William, and not John, and an exception having been taken by the prisoner's counsel to the variance, he was acquitted on that ground. Upon the present indictment it was agreed by the prisoner's counsel and the attorney for the United States, that the prisoner should have the benefit of the plea of *autre fois acquit*, upon the plea of not guilty, in the same manner as if he had pleaded it specially.

The COURT decided that the acquittal upon the former indictment was not a bar to the present; being of opinion that the exception taken to the former indictment was fatal. See 1 Chitty, Cr. Law, 455.

The prisoner's counsel also contended that the instrument forged was not an order within the English decisions upon the English Statute of 7 Geo. 2, c. 22; *Mitchel's case*, 2 East, Cr. Law, 936, and *William's case*, and *Eller's case*, 1 Leach, Cr. Law.

But the COURT said, that upon that point he might move in arrest of judgment if the prisoner should be convicted. See *Bates's case*, in this Court, June term, 1810, (*ante*, 1,) upon the Act of Maryland, 1799, c. 75, § 2, in which the Court decided that the words "draft for the payment of money or delivery of goods," included such an order as the present. Verdict, guilty.

Motion in arrest of judgment overruled.

 BANK OF THE METROPOLIS v. JOSEPH WALKER.

If payment of a promissory note be demanded of the maker on the third day of grace,

Negro Daniel v. Kincheloe.

after banking hours, and notice of the non-payment be given to the indorser on the next day, the demand is not too soon nor the notice too late.

ASSUMPSIT against the last indorser of Toppan Webster's note for \$1000, due 10th, 13th January, 1819. All the parties lived near the Bank of the Metropolis, in the city of Washington. Payment was demanded of the maker, by a notary public, on the 13th of January, the last day of grace, after three o'clock, P. M., and notice of non-payment was given to the defendant on the next day, viz.: on the 14th of January.

A verdict for the plaintiff was taken subject to the opinion of the Court, upon the said facts, whether the demand and notice were competent and sufficient in law to charge the defendant in this action with the payment of the said sum of \$1000, in the said note mentioned.

The note was not made payable at any bank, and it was proved to be the practice of some of the notaries in this district to give notice on the day of the demand of payment, and of others to give notice on the next day.

Mr. Jones, for the defendant, cited *Chitty on Bills*, 318, &c. The note must be paid on the third day of grace, when demanded. If not then paid it is dishonored, and notice should be given immediately. All the parties lived within a few minutes' walk of each other. Notice should be given on the same day. *Tassel v. Lewis*, 1 Lord Raym. 743. In *Lenox v. Roberts*, 1 Wheat. 373, the Supreme Court of the United States said, that notice must be given by mail on the third day of grace. See also 6 East, 3; 15 East, 291, and *Chitty on Bills*, 401, Ed. 1821, by Cary.

The COURT stopped *Mr. Lear*, in reply, and said that the demand and notice were sufficient.

 NEGRO DANIEL v. ANN KINCHELOE.

From a power to hire out a slave, and receive his wages, the jury cannot infer a power to sell him.

If the importation of a slave into this county be with intent that he should be hired out for a limited time only, it is not such an importation as is forbidden by the Maryland Act of 1796, c. 67, § 1.

PETITION for freedom.

Upon the trial, the COURT (*nem. con.*) instructed the jury that from the fact that young Kincheloe had authority to hire out the slave and receive his wages, they could not infer that he had authority to sell the slave; and further instructed the jury, (*MORSELL, J., contra*.) that if they should be satisfied by the evidence,

that the importation of the petitioner into the county of Washington was with the intent that he should be hired to remain a limited time only, and not to reside permanently, it was not such an importation as is within the first section of the Maryland Act of 1796, c. 67.

UNITED STATES v. HENRY WRIGHT.

If forged papers be inclosed and sealed up in a letter written in the State of Tennessee, and there directed to the paymaster-general in the city of Washington and sent by the mail, with intent to defraud the United States, and the letter be received and opened by the paymaster-general in Washington, this is not an uttering and publishing of the said forged papers in the county of Washington.

THE indictment in this case charged that the defendant at the county of Washington in the District of Columbia, with intent to defraud the United States, feloniously uttered and published as true, and caused to be uttered and published as true, certain forged papers and documents respecting a pension, against the peace and government of the United States. Another count charged that the defendant at the said county of Washington, feloniously caused the said forged papers and documents to be uttered and published as true.

Upon the trial, N. B. Vanzandt, a witness sworn on the part of the United States, testified that he had received several letters from a person, who signed his name H. Wright. That the prisoner afterwards came to his office and conversed with him on the subject of the claims to which those letters referred. That he never saw him write. That the letters now shown to him are in a handwriting like that of the letters which he had received, signed H. Wright; but these letters were not produced.

Mr. Jones, for the defendant, objected to Mr. Vanzandt's testifying as to the similarity of the handwriting, especially as the letters to Mr. Vanzandt were not produced at the trial, and as there was no evidence that they were written by the defendant.

Mr. Swann, *contra*, cited Phil. on Ev. 364.

THE COURT (CRANCH, C. J., doubting,) said that the presumption from those circumstances was so strong as to justify the admission of Mr. Vanzandt to testify as to the similarity of the handwriting.

The jury found a verdict, stating that the traverser did feloniously utter and publish the forged papers contained in the letter to the paymaster-general, with intent to defraud the United States, he then knowing the same to be false, forged, and counterfeit. But they also found "that the letter inclosing the same was written

in the State of Tennessee by the traverser, and was sealed up by the traverser in the State of Tennessee, and directed and sent by him, by the mail, to Nathan Towson, the paymaster-general then in the city of Washington; and that the said letter, being brought by the said mail, was opened by the said Nathan Towson, sometime in the month of January, 1821, in the city and county of Washington aforesaid; the traverser not being then, nor ever before or after, till the month of March, 1821, in the District of Columbia; and whether, under these circumstances the traverser is guilty of uttering and publishing the said forged papers in the county of Washington, is submitted to the Court as a question of law. If the law should determine that the uttering and publishing so as aforesaid made, should be considered as in the county of Washington, then we find the traverser guilty as above stated in the said county; but if otherwise, we find him not guilty."

Mr. Key, for the defendant. If the facts stated in the special verdict amount to an uttering or publication, it was complete in Tennessee, when the defendant put the letter into the post-office there. If the offence be complete there, he cannot be tried here for the same offence. He did no act afterwards. His crime could not depend upon the act of the paymaster-general. There is no law making the uttering and publication of such papers a crime. At common law, it must be of a paper of a public nature, and to the prejudice of another person's rights. It is no crime at common law to publish as true a forged paper at a place where it was not forged. 1 Hawk. P. C. 182, c. 70; 4 Bl. Com. 247.

This Court cannot send the defendant to Tennessee to be tried; and if it could, this is an indictment at common law, and there can be no common-law offences against the United States in Tennessee. All common-law offences there, are offences against the State of Tennessee, not against the United States. The United States Courts have no common-law criminal jurisdiction.

Mr. Swann, *contrà*. The publication of a forged release is indictable at common-law. *Commonwealth v. Searle*, 2 Binney, 332. The receipt and opening of the letter in Washington, is a publication there. *Rex v. Johnson*, 7 East, 65. Inclosing and sealing them up in Tennessee was certainly no publication in Tennessee. He caused them to be uttered and published in Washington, by inclosing and sending them by the mail.

Mr. Jones, in reply.

The defendant had never been in the District of Columbia until long after the receipt and opening of the letter containing the forged papers. The case of *Rex v. Johnson*, cited from 7

Riggs v. Graeff.

East, 65, is a case of publication of a libel in London, written by the defendant in Ireland. The procurer and the publisher were both guilty of the publication; if it had been a case of felony, Cobbet, who published it in London, would have been the principal, and Johnson would have been an accessory; but in misdemeanors there are no accessories, and he was therefore a principal.

Judgment for the defendant, on the special verdict.

ROMULUS RIGGS v. JOSEPH GRAEFF, JUNIOR.

The payee, indorser of a lost inland bill of exchange, is not liable to the indorsee, unless the latter has offered indemnity to the drawer and indorser against the lost bill, and demanded a new bill from the drawer.

ASSUMPSIT by the indorsee against the indorser of a lost inland bill of exchange.

The declaration had three counts. The first was the common count upon the non-acceptance of the bill, without saying anything of its loss. The second was special, and averred the drawing of the bill at Washington, D. C., for \$400, by one Charles S. Hanna upon John H. Hanna of Frankfort in Kentucky, at five days' sight for value received, payable to the defendant and by him indorsed to the plaintiff, dated on the 21st of January, 1819; and that the plaintiff, on the same day, caused the said bill to be inclosed in a letter addressed to Messrs. Wilson & Merrill, his correspondents at Frankfort, Kentucky, and put the said letter and bill into the post-office in Georgetown, so directed and addressed; and by the said letter required the said Wilson & Merrill, upon receipt of the bill, immediately to present the same to the said John H. Hanna for acceptance, and, if accepted, when due to collect the same. That the said letter and bill so inclosed in it never came to the hands of the said Wilson & Merrill, and is lost and destroyed and has never been heard of; that as soon as he was informed by Wilson & Merrill in answer to a letter of inquiry from the plaintiff, that the said letter and bill had not come to hand, the plaintiff forthwith wrote to Wilson & Merrill to call upon the said John H. Hanna and inform him that a bill of the tenor and effect above mentioned had been negotiated and passed to the plaintiff, and that the same had been lost by transmission in the mail, and to demand of him to engage to pay the sum of money in the said bill mentioned according to the tenor and effect thereof and the indorsement thereon. That upon receipt of those instructions, the

Bank of the United States v. Crabb.

said Wilson & Merrill did call on the said John H. Hanna and inform him that the plaintiff had held a bill of the tenor above specified, and that the same had been lost in its transmission by mail between Georgetown and Frankfort, and did demand of him to accept for, and engage to pay the sum of money in the said bill mentioned, according to the tenor and effect thereof and the said indorsement thereon; but the said John H. Hanna did not then accept for, and engage to pay the said sum of money in the said bill mentioned, according to its tenor and effect and the indorsement thereon, but wholly refused so to do, and therein made default; of all which premises the said defendant, afterwards, namely, the day and year aforesaid had notice; by means whereof and by force of the custom and laws of merchants aforesaid, the said defendant became liable to pay to the said plaintiff the said sum of money in the said bill mentioned, when he should be thereto afterwards requested; and being so liable, &c., promised to pay, &c. The third count was for money had and received.

Mr. Dunlop and *Mr. Key*, for the plaintiff, contended that it was not necessary for the plaintiff to tender indemnity, as more than a year had elapsed since the loss of the bill, and it had never been presented for acceptance or payment.

Neglect to present for acceptance discharges the indorser. *Chitty on Bills*—New Edition, pp. 166, 178, 201, 202, 203, 204.

Mr. Wallach, contra. If a bill be put in circulation, there is no limit to the time for presentation. It does not appear that the defendant may not yet be liable upon the bill itself. Indemnity, therefore, should have been offered before the plaintiff could be entitled to recover of this defendant. The plaintiff cannot recover without indemnity. *Peirson v. Hutchinson*, 2 Camp. 211; *Chitty*, 175, 198, 208, 273.

The COURT (*nem. con.*) decided that the plaintiff could not support the action upon the special count, as no indemnity had been tendered, nor any demand made of a new bill. And, that as the defendant did not receive any value for the bill, but indorsed it only to give it credit, the plaintiff could not recover upon the count for money had and received.

 BANK OF THE UNITED STATES v. CRABB.

Taking sixty-four days discount, upon discounting a note payable at sixty days, is not usury.

ASSUMPSIT upon a note payable sixty days after date, dis-

Brown v. Wingard.

counted by the plaintiffs, reserving sixty-four days discount. Defence, usury.

The COURT (*nem. con.*) was of opinion that it was not usury. The argument of counsel was very slight; and after the Court intimated its opinion, the defendant withdrew the defence.

DAVID STEWART v. ROBERT FRENCH.

If a promissory note, payable at a certain day, be indorsed and passed away after its day of payment, it is then a note payable on demand, and demand and notice are necessary to charge the indorser, although he knew the maker to be insolvent at the time he indorsed it.

ASSUMPSIT against the indorser of W. A. R.'s note for \$150, at sixty days, dated July 16, 1819, indorsed by the defendant, to the plaintiff, on the 16th of October, 1819, in part payment for a gig valued at \$300.

Upon the trial of this cause at the last term, (CRANCH, C. J., absent,) the Court instructed the jury, "That if the note was passed to the plaintiff, after the same was at maturity, for a full and valuable consideration, the holder was bound to make demand of payment of the same, of the drawer, in a reasonable time after the same was so passed, and to give notice of non-payment to the defendant, the indorser, unless the jury should believe, from the evidence, that the said defendant practised a deception on the plaintiff in so passing the said note, after it was at maturity, or, that it was known to the defendant that the said W. A. R., the drawer, was insolvent."

The verdict being for the plaintiff,

Mr. Dunlop, for the defendant, moved for a new trial, on the ground of misdirection of the jury, by the Court, and cited *Farnham v. Fowle*, 12 Mass. Rep. 89; *Sanford v. Dillaway*, 10 Ib. 52, 53, 54; *Barry v. Robertson*, 9 Johnson, 121, and *Chitty on Bills*, 274, new edition, in a note.

Mr. Ashton, for the plaintiff, contended that the plaintiff had a right to recover for the balance of the purchase-money covered by the note, which was of no value, upon the count for goods sold and delivered.

The COURT (THRUSTON, J., absent,) granted a new trial.

JOSEPH BROWN, (NEGRO,) v. MARY WINGARD.

No executory contract between a master and his slave can be enforced, either at law or in equity.

THE petition of negro Joseph Brown, stated, that before the

year 1818, he then being the slave of Abraham Wingard, the defendant's testator, entered into an agreement with the said Abraham, at his, the said Abraham's request, for the purchase of his freedom, at and for the sum of nine hundred dollars, to be paid by the petitioner. That the said Abraham immediately suffered the petitioner to go at large and labor for his own use; and in the course of that year he paid the said Abraham \$300, and in the next year, \$550, expressly as the purchase-money of the petitioner's freedom, leaving a balance of fifty dollars due, as appears by the receipt of the said Abraham, in his handwriting, and signed by him, in these words. "1819. Received from Joseph Brown five hundred and fifty dollars in part payment of his freedom. Abraham Wingard. Due me now, from Joseph Brown, fifty dollars, which, when paid, will be in full. A. W."

The petition further stated, that he could prove, by the most respectable testimony, that the said A. Wingard, in his lifetime, after the year 1818, always spoke of him as entitled to his freedom, upon payment of the said fifty dollars; and that he had solemnly contracted with the petitioner for his freedom. It states, further, that he brings into Court the fifty dollars, ready to be paid to the defendant, the executrix of the said Abraham's will, but she refuses to manumit him; he therefore prays the Court to decree that she should, by a good deed, manumit him, and set him free.

The jury, in a special verdict, found the facts to be nearly as stated in the petition; and further, that in 1816 and 1817, about the time the agreement was made, the said Abraham Wingard was largely indebted, but believed not to be insolvent; that in 1818 and 1819 property in Georgetown fell, and there was more doubt of his solvency. That he died about January, 1820, and his estate has been found to be largely insolvent. That the defendant holds the petitioner, as executrix, to be accounted for according to law. That the petitioner is under forty-five years of age, and able to gain a livelihood by labor; whereupon the jury say, that if, upon the facts above stated and found, the Court should be of opinion that the petitioner has any claim, in law or equity, to his freedom, then they find for the petitioner, and if otherwise, then for the defendant.

Mr. Key and *Mr. Jones*, for the petitioner. Equity will not regard the want of an intervening trustee between the master and slave. As in a case of a contract directly between husband and wife, equity will enforce the contract. So, it will not regard the want of a legal deed of manumission. It considers that done which ought to be done. There being a valuable consideration, equity will consider the master himself as a trustee for the benefit

Brown v. Wingard.

of the slave. There is no law to prevent a verbal manumission. In England a villein may be enfranchised by implication. The Act of Maryland, 1752, c. 1, which prohibited manumission by verbal order, was repealed by the Act of 1796, c. 67. Such manumission was lawful before the Act of 1752, or it would not have been necessary to pass that act to prohibit it. The opinion of Mr. Dulany, in 1 Har. & McHenry, 563, that slaves "could have no legal remedy against their master for any matter anterior to their manumission," is not law now. The Act of 1796 does not forbid such a manumission. The only restraints in that act are, the age and capacity of the slave, and the interfering rights of creditors. This was not a contract in fraud of creditors. The case of *Kettletas v. Fleet*, 7 Johns. 328, 375, shows that the Court will enforce an executory contract with a slave; and the case of *Sally v. Beatty*, from South Carolina, in 1 Bay's Rep. 260, shows that a slave may acquire property. Here the contract is carried into effect. The slave has been actually set free, and the consideration money has been paid.

Mr. Augustus Taney, contra.

There is no case under the Maryland law in which a verbal order has been deemed a manumission, either in law or equity. A villein, in England, could not be enfranchised without deed, or matter of record. A suit by the lord, against his villein, was a record-acknowledgment of his freedom. The laws of slavery, in New York, differ from the laws of Maryland. The New York cases, therefore, do not apply. Besides, there is a difference between a contract and a benevolence. This is a mere benevolence. There was no consideration; for all that the slave could earn belonged to the master. A mere benevolence must be completely executed. It cannot be enforced as a contract.

The statute requiring certain solemnities, as necessary to the validity of manumission, is virtually negative of all other modes of manumission. General policy requires such a restriction.

If Abraham Wingard himself were now present, and a party to this suit, and were insolvent, the contract could not be carried into effect to the prejudice of creditors. Their rights intervene before the contract is executed, and must prevail.

To every contract there must be two parties competent to contract. The petitioner is still a slave, and, in law, incapable of contracting.

The COURT, having taken time to consider, ordered judgment to be entered up for the defendant.

BAZIL WOOD *et al.* v. HENRY FORREST *et al.*

It is not necessary to the validity of a replevin bond, that the plaintiff in replevin should be bound in the bond.

DEBT upon a replevin bond.

The bond was in this form: "Know all men, by these presents, that we, Richard M. Scott, trustee of Mrs. Elizabeth C. Watson, and Henry Forrest, James Watson, and J. G. Slye, of Washington county and District of Columbia, are held and firmly bound unto Bazil Wood and Henry B. Robertson," &c.—but was executed by the last-named three obligors only, Mr. Scott not having signed or sealed it.

The condition was in the usual form, but it stated, in its recital, that the writ of replevin, which was about to be sued out, was "to be returnable to the said Circuit Court next to be held at the city of Washington, in the District of Columbia, on the of next."

The defendants, after oyer, demurred generally, to the declaration.

Mr. Randall, for the defendants, contended that the bond was void, because not taken according to the directions of the statute of 11 Geo. 2, c. 19, § 23, which, in case of replevin for distress taken for rent, requires the bond to be taken "from the plaintiff and two responsible persons as sureties."

So, a bail-bond, the condition of which is not conformable to the statute, is void. 5 Com. Dig. 646, 647.

Mr. Jones, contra. That might perhaps have been a ground for a motion to quash the replevin, but the defendants cannot now take advantage of it. The blank, in the condition as to the day of the sitting of the Court, is immaterial, as it states it to be "the said Circuit Court next to be held at the city of Washington," the time for the holding of which is made certain by law.

The Court took time, during the vacation, to consider the case, and, at the next term, rendered judgment upon the demurrer, for the plaintiffs; and the plaintiffs executed a writ of inquiry, and the jury assessed their damages to the full amount of the debts and costs for which the property had been taken in execution by the plaintiffs, who were constables.

GEORGE KING v. THOMAS FOYLES.

If Saturday be the last day of grace upon a promissory note, and payment thereof be demanded, on that day, of the maker, in Georgetown, D. C. in time to give notice

King v. Foyles.

by the mail of the same evening to the indorser living in the city of Washington, notice put into the Georgetown post-office for the evening mail of the following Monday, is too late.

ASSUMPSIT against the indorser of J. Carlon's note for \$223 at thirty days, dated December 13th, 1819. Payment was demanded in Georgetown, by the notary public on Saturday, the 15th of January, 1820, between three and four o'clock, in the afternoon, that being the last day of grace. The mail from Georgetown to Washington closed at nine o'clock of the same evening; the next following mails closed on Sunday and Monday evening at the same hour. The notary did not put his notice to the defendant, who resided in Washington, into the post-office at Georgetown, until nine or ten o'clock on Monday morning, the 17th of January, so that it could not be received in Washington until Tuesday morning, when the letters by the mail of the preceding evening were according to the course of the mails received and delivered in Washington.

The notary public who protested the note, testified that it had always been his custom, as notary, and, he believed, of other notaries in Georgetown, to put such notices for persons residing in Washington into the Georgetown post-office on the next morning after the demand and refusal of the drawer; that is, on the next day after the last day of grace, unless the last day of grace fell on Saturday; and in that case to put such notice into the Georgetown post-office on the Monday following. Another notary public, also residing in Georgetown, testified that the practice of himself and other notaries of Georgetown, was to put such letters of notice into the Georgetown post-office, sometimes on the evening of the same day the demand was made, when that was Saturday, and sometimes on the Monday following.

A verdict was taken subject to the opinion of the Court upon the sufficiency of the notice, under the circumstances before mentioned.

Mr. Augustus Taney, for the plaintiff. The custom of the place governs in such cases. Sunday is not *dies juridicus*, although the law authorizes a mail to be made up on that day. The maker has the whole of the last day of grace to pay the note, and notice on the next day is early enough. *Leftly v. Mills*, 4 T. R. 170; *Darbyshire v. Parker*, 6 East, 3; *Tindal v. Brown*, 1 T. R. 167; *Langdon v. Tupper*, 15 East, 291. Monday was the day next after the last day of grace. *Robson & Waugh v. Bennet*, 3 Taunt. 388; *Burbridge v. Manners*, 3 Campbell, 193; Chitty, 401, Edition 1821, by Carey. Each party has one day to give notice to the party immediately liable to him.

The Court stopped *Mr. Jones* in reply, and said that the notice

Goldsborough v. Jones.

should have been put into the post-office on Saturday or Sunday ; that the notice was too late.

Judgment for the defendant.

GOLDSBOROUGH v. JONES.

If the maker of a promissory note, dated at the city of Washington, resides two miles out of the city, but within the county of Washington, and being a clerk in one of the executive departments of the government of the United States, and usually employed from ten to three o'clock, in a room in the public executive buildings with other clerks, comes, for that purpose, into the city in the morning, and returns to his house in the country in the evening, his absence from the room in the executive buildings at the time the notary called to demand payment of the note, although within the usual hours of public business, was no excuse for not making a personal demand, or a demand at his dwelling-house.

A demand of the bar-keeper of a tavern to which the livery stable was attached, in which he occasionally left his horse while at the office, is not a sufficient demand.

ASSUMPSIT against the indorser of a promissory note for \$654.22, payable 1st—4th January, 1820. The maker of the note was, at the time of making it, and for a long time before and after, a clerk in the department of war, and as such was daily employed at the said department in the city of Washington, from 10 o'clock, A. M. till 3 o'clock, P. M., and for that purpose came daily into the city from his dwelling-house in the county of Washington, about two miles out of the city, and returned to his house in the country at the close of office hours, at the said department, at 3 o'clock, P. M. The defendant, the indorser, resided in the city. The note was deposited in the Bank of Columbia for collection ; and on the last day of grace, between 3 and 4 o'clock, P. M. was sent by the bank to the notary public for demand and notice, who went immediately to the room of the war department, wherein the maker of the note was usually employed as such clerk, for the purpose of demanding payment of the note ; but being informed that the hours of business at the department were closed, and that the maker had gone home, he did not demand payment of the note at the office, but immediately proceeded to the hotel, where he understood the maker kept his horse while attending as clerk at the office, and, not finding the maker there he demanded of the bar-keeper of the hotel payment of the note, who answered that the maker of the note did not live in the city. Whereupon the notary protested the note, and immediately left a written notice of the dishonor of the note at the defendant's house in the city. On the next day, January 5th, 1820, during the usual office hours at the department, the notary went again to the same room of the war department, and inquired for the maker, and was an-

The Bank of Columbia v. Bunnell & Robertson.

swered by one of the clerks who wrote in the same office that he was not in; whereupon the notary made a second protest, and immediately left another written notice of the dishonor of the note with a servant at the defendant's house; and on the 6th of January, left a third notice of the dishonor of the note at the defendant's house. The maker never boarded or lodged at the hotel before mentioned.

This case was submitted to the Court upon these facts, and it was agreed that if the Court should thereupon be of opinion that the demand and notice above stated were sufficient to charge the defendant as indorser, the judgment should be for the plaintiff; otherwise for the defendant.

The COURT rendered judgment for the defendant.

THE BANK OF COLUMBIA v. BUNNELL & ROBERTSON.

An execution issued by order of the President of the Bank of Columbia, without judgment, ought not to include the notary's fee for a protest, but if the bank releases the fee, the Court will not quash the execution.

Such an execution may include five dollars for an attorney's fee, and the interest which has accrued upon the debt up to the time of ordering the execution.

MOTION, by *Mr. Redin*, for the defendant, to quash three writs of *fieri facias* against the defendants as indorsers of Edward Ford's note issued by order of the President of the Bank of Columbia, under the 14th section of its charter of 1793, c. 30, which authorizes him upon non-payment of a note, made expressly negotiable at that bank, to order execution, "on which the debt and costs may be levied by selling the property of the defendant for the sum mentioned in the said note," "provided" the President shall "make oath," "ascertaining whether the whole or what part of the debt due to the bank" "on the said" note, "is due."

Mr. Redin made three objections to these executions.

1st. That each execution included five dollars for an attorney's fee.

2d. That they included not only the debt, but the interest up to the time of ordering the executions; and

3d. That each execution included \$1.75 for cost of protest.

It has been decided by this Court, and by the Supreme Court, that it is not necessary to protest a promissory note; and the notary's fee for protesting is no part of the legal taxable costs. No attorney's fee can be taxed upon an execution.

Mr. Key, contra. Although this is an execution, yet it is the commencement of a suit. Both parties may appear at the return and litigate the case. The bank could only appear by attorney.

Williams v. Threlkeld.

The COURT (*nem. con.*) decided that the fee for protest ought not to be included; and (THRUSTON, J., *contra*,) that the attorney's fee might be included. But upon the bank releasing the cost of protest, the COURT (*nem. con.*) refused to quash the executions.

THE BANK OF THE UNITED STATES v. JAMES D. BARRY.

A verbal notice to the indorser on the 18th, (being the day after the last day of grace,) that payment had been demanded of the maker on the 17th, and that the note would be protested if not paid on that day, (the 18th,) is not a sufficient notice to charge the indorser.

ASSUMPSIT against the indorser of Thomas Foyles's note due 14th—17th of October, 1820. Payment was demanded of the maker on the 17th; and the notary on the 18th gave verbal notice to the defendant that the note was due and would be protested for non-payment unless paid on that day; and that he had demanded payment of the maker of the note on the 17th.

A verdict was taken for the plaintiffs, subject to the opinion of the Court upon the sufficiency of the notice to the defendant. The maker and defendant both resided in the city of Washington.

The COURT (*nem. con.*) was of opinion that the notice was not sufficient. *Non-pros.*

WILLIAMS v. THRELKELD.

An auctioneer's memorandum, or entry in his sales book, of a sale of lands, is not sufficient to take the case out of the Statute of Frauds, if it does not sufficiently describe the land, and the terms of sale.

Quære, whether an auctioneer's written memorandum of the sale of lands is in any case sufficient to take the case out of the statute?

THIS was an action brought to recover the purchase-money of about four and a half acres of land, being Lot No. 299, in Beatty & Hawkins's addition to Georgetown, amounting to \$587.01. Upon a demurrer to the evidence the principal question was, whether the auctioneer's written memorandum of the sale was sufficient to take the case out of the Statute of Frauds.

The memorandum, a duplicate of which was delivered to the plaintiff, was as follows:—

“April 12, 1819.

“4½ acre lot \$144 per acre; Threlkeld,

“Lot 55 by 67; 8.12½, J. Cox, is \$446.87½

“ “ 55 by 40; 5.62, J. Cox, “ 309.10

\$705.97½

“Sold for Mr. Williams.

“J. Peabody, Auct.”

Williams v. Threlkeld.

Mr. Key, for the plaintiff, contended that the auctioneer is the agent of both parties in the sale of lands, exactly as he is in the sale of goods. *Emerson v. Heely*, 2 Taunt. 38; *Coles v. Trecothick*, 9 Ves. 349; *White v. Proctor*, 4 Taunt. 209; 2 Livermore on Agency, 355; *Kerneys v. Proctor*, 3 Ves. and Beames, 57.

Mr. Redin, *contra*, cited *Simon v. Motivos*, 3 Burr. 1921; *Stansfield v. Johnson*, 1 Esp. c. 101; *Walker v. Constable*, 2 Esp. c. 659; S. C. 1 B. & P. 605; *Buckmaster v. Harrop*, 7 Ves. 341; *Simonds v. Catlin*, 2 Caines, 61; *Jackson v. Catlin*, 2 Johns. 248; *Symonds v. Ball*, 8 T. R. 151; *Grant v. Naylor*, 4 Cranch, 234; *Coles v. Trecothick*, 9 Ves. 234; *White v. Proctor*, 4 Taunt. 209.

Mr. Redin further objected, that the auctioneer's memorandum did not contain the conditions and terms of the sale, nor a description of the land.

The COURT, without deciding the question whether an auctioneer's memorandum of the sale is sufficient to take it out of the Statute of Frauds, was of opinion, that in this case it did not sufficiently in itself describe the property, nor the terms of the sale; nor refer to any other instrument that does describe them.

Judgment, on the demurrer, for the defendant.

CIRCUIT COURT OF THE UNITED STATES.

MAY TERM, 1822, AT ALEXANDRIA.

UNITED STATES *v.* ADAM LYNN.

A witness is not bound to answer a question, if it shall appear to the Court that the answer would have a probable tendency to criminate the witness.
The contents of a written paper cannot be proved by parol, unless the paper be lost or destroyed.

THE defendant was indicted for sending a challenge to James McGuire to fight a duel. James McGuire, who stood indicted for accepting the challenge, was produced as a witness for the United States, and was asked whether such a written challenge is in existence.

Mr. Hewitt and *Mr. Taylor*, for the witness, objected, that the answer might tend directly to prove a fact necessary to convict *Mr. McGuire*.

Mr. Swann, for the United States, mentioned the case of Doctor Kearney, at the last term in Washington, when a majority of this Court determined that a similar question must be answered by the witness. The chief justice of the United States, in *Burr's case*, went too far in saying that the witness was not bound to answer the question, if the answer might tend to prove a fact which would be a necessary link in the chain of evidence to support a prosecution against the witness.

Mr. Taylor, in reply. There is a difference between *Kearney's case* and this. There, Kearney was not indicted for being concerned in the duel; and the Court did not know whether he was present as a party, or only as an accidental witness.

THE COURT, (*Thruston, J.*, absent,) said, that as there is a prosecution against the witness for accepting the challenge, and as the existence of the challenge would be a material fact in the evidence against him upon the trial, and as he stated that he could not answer the question without implicating himself, he was not bound to answer it.

MORSELL, J., stated his opinion to be, that as in the present case there was a prosecution against the witness for accepting the

challenge, the witness was not bound to answer the question, if he had in fact accepted the challenge, (which he himself best knew,) because it appeared to the Court that the answer would have a probable tendency to criminate the witness.

Evidence having been given that the challenge, if any, was in writing, and in the possession of a witness residing in Washington, the Court refused to permit parol evidence to be given of its contents, and refused to adjourn the jury over, to give the United States time to send for that witness.

Verdict for the defendant.

DANIEL RENNER v. THE BANK OF COLUMBIA.

The security, which a judge, signing a citation on a writ of error which is to be a *supersedeas*, shall take, is to be for the costs and such damages as the Supreme Court may award for the delay.

Mr. Jones, upon applying to MORSELL, J., for a citation upon a writ of error in this cause, offered a bond with surety in the penalty of . . . The judge, doubting whether it ought not to be in double the amount of the judgment recovered in this court, submitted the question to the Court.

The words of the 22d section of the Judiciary Act of 1789, [1 Stat. at Large, 73,] are, "shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs, if he fail to make his plea good," and by the 23d section it is enacted, "That where, upon such writ of error, the Supreme, or a Circuit Court shall affirm a judgment or decree, they shall adjudge or decree, to the respondent in error, just damages for his delay, and single or double costs, at their discretion."

Mr. Jones contended, that the damages and costs provided for in the 22d section, were the damages and costs which the Court were obliged by the 23d section to award to the respondent in error, upon affirming the judgment of the Court below. By the Act of 12th December, 1794, [1 Stat. at Large, 404,] it is enacted that where the writ of error shall not be a *supersedeas* and stay execution, the security to be taken upon signing the citation, shall be only to such an amount, as, in the opinion of the judge, taking the same, shall be sufficient to answer all such costs, as upon an affirmance of the judgment or decree, may be adjudged or decreed to the respondent in error. So that where the writ of error is not a *supersedeas*, the security is to be for costs only, but when it is a *supersedeas*, it is to be for costs and the damages

incurred by failing to make his plea good ; i. e., such costs and damages for delay as shall be adjudged by the Appellate Court upon affirmance of the judgment of the Court below.

The COURT (*nem. con.*) was of opinion that Mr. Jones's construction of the statute was right.

This opinion was overruled by the Supreme Court of the United States in the case of *Catlett v. Brodie*, 9 Wheat. 553.

JOHN B. GORMAN v. SAMUEL A. MARSTELLER.

In trespass *quare clausum fregit*, the plaintiff must prove a trespass in the county in which the suit is brought.

If the close lie partly in Virginia, and partly in the District of Columbia, the injury done in the Virginia part may be given in evidence under the *alia enormia*.

An entry into the District part, with intent to do injury in the other part of the close, is unlawful, although without such intent, it would have been lawful.

TRESPASS *quare clausum fregit*. The close was called Spring Garden, the greater part of which was in Virginia, and the remainder in the County of Alexandria, in the District of Columbia. The entry upon the District part, was with intent to do an injury in the Virginia part ; and without such intent, the entry would not have been a trespass.

The COURT (THRUSTON, J., absent,) at November term, 1821, instructed the jury, 1st. That the plaintiff must prove a trespass in the County of Alexandria, in the District of Columbia.

2d. (CRANCH, C. J., strongly doubting.) That the injuries done on the Virginia side of the line might be given in evidence under the *alia enormia* ; and

3d. That an entry on the district part of the close, with intent to do the injury on the other part, was a trespass.

See *Pope v. Davies*, 2 Camp. 266 ; *Bulwer's case*, 7 Co. 1 ; *Doulson v. Matthews*, 4 T. R. 503 ; *Mostyn v. Fabrigas*, Cowp. 164 ; *Alves v. Hodgson*, 7 T. R. 241.

Verdict for the plaintiff, \$100.

A motion for a new trial, upon a suggestion of misdirection of the jury by the Court, as to the admission of evidence of injuries done in Virginia under *alia enormia*, (those injuries being of themselves substantial causes of action in Virginia,) was argued at November term, 1821, by *Mr. Mason*, for the defendant, and *Mr. Wise*, for the plaintiff, and continued to May term, 1822, for consideration, when it was argued again before a full Court, by *Mr. Mason* and *Mr. Hewitt*, for the defendant, and *Mr. Wise* and *Mr. Fendall*, for the plaintiff, when the new trial was refused. CRANCH, C. J., still doubting.

JOHN C. VOWELL v. JAMES PATTON.

When the indorser of a promissory note has a public office in town, at which he generally attends every day, and in his absence has a servant there to receive messages, &c., a notice put into the post-office of that town, directed to the indorser, is not sufficient notice to charge him, without proof that he actually received it in due time, although the indorser's family reside five miles out of town, and the town post-office is the nearest post-office, and the one to which letters for him are generally directed.

ASSUMPSIT against the indorser of Robert Munro's promissory note due at Georgetown, D. C., on the 3d - 6th of the month. It was protested on the 7th, and notice sent to the Farmers' Bank of Alexandria on the same day. On the 8th, that bank put a notice to the defendant into the post-office in Alexandria, in which town he (being the British consul) had a public office, at which he generally attended every day; and in his absence had a servant there to receive messages, &c. His family resided about five miles out of town, but the Alexandria post-office was the nearest post-office, and that to which letters directed to the defendant were generally directed, and at which he generally called daily for letters.

The COURT (THRUSTON, J., absent,) instructed the jury, that evidence of leaving the notice at the post-office, was not sufficient evidence of notice, to charge the defendant; but that if the jury were satisfied by the evidence, that the defendant actually received the notice, on the day on which it was put into the post-office, the notice was sufficient. The Court, however, did not give any opinion whether the notice was in due time.

ARNOLD BOONE v. JOHN JANNEY.

The mistake of the clerk in misnaming one of the parties in a commission to take the deposition of a witness, may be amended by the order in case of the death of the witness before the trial.

An order had been given to the clerk to issue a commission to take the deposition *de bene esse* of one J. B. Hewes, in the cause of *Arnold Boone v. John Janney*. The clerk, in the commission, had misnamed the defendant *Thomas*, instead of John. After the deposition was taken, the witness died before the trial.

Mr. Jones, for the plaintiff, moved for an order to the clerk to amend the commission; it being a clerical error, there being no such suit against *Thomas*.

Mr. Swann, for the defendant, objected.

But the COURT overruled the objection, and ordered the amendment.

 Scott v. Bartleman.

NEALE v. PEYTON.

Demand of payment on the 5th of July, of a note due on the 1st-4th of July, is too late to charge the indorser, and the insolvency of the maker will not excuse the delay.

ASSUMPSIT against the indorser of a promissory note. The note was put into the Bank of Potomac for collection, and fell due on the 1st-4th of July. The note was not given out, and no demand of payment was made on the maker of the note until the 5th of July. The maker was insolvent.

The COURT (THRUSTON, J., absent,) said it was too late, and that the insolvency of the maker did not excuse the delay.

 MASSOLETTI v. MILLER.

One of two joint owners of a vessel, is a competent witness to prove a joint claim against a passenger in the vessel, for the passage-money, if the other joint owner has given credit in account for his share of the passage-money, and a release of a claim to recover it back in case he should not get it from the passenger.

THIS was an action for money had and received by the defendant, for goods of the plaintiff sold by the defendant on commission. The defendant claimed to set off the amount of passage-money due by the plaintiff to the defendant, and one Howland, who were joint owners of the brig Benefactor, for the plaintiff's passage from Marseilles; and to prove this set-off, the defendant offered the other joint owner, Howland, as a witness, the defendant having credited him in account with his share of the passage-money, and given him a release from all claim which he might have to recover it back from Howland, in case the defendant should fail to get it from the plaintiff.

The COURT (THRUSTON, J., *contrà*,) decided that the witness was competent.

 RICHARD M. SCOTT v. W. BARTLEMAN.

If I hire a slave for a year, and he be arrested for theft at any time during the year, and imprisoned therefor during the residue of the term for which I have hired him, I must pay the stipulated hire, and suffer the loss of service.

ASSUMPSIT, for \$36, for one year's hire of a negro woman, the slave of the plaintiff, hired by the defendant for a year. Within

Irwin v. Brown.

ten days after hiring, she was arrested and imprisoned upon a warrant for theft, and kept in custody the residue of the year.

The COURT (THRUSTON, J., absent,) instructed the jury, that the loss of time and service must fall on the defendant.

Mr. Swann and *Mr. Fendall*, for the plaintiff.

Mr. Taylor, for the defendant.

THOMAS IRWIN v. JESSE BROWN.

If an inland bill of exchange be signed thus: "Witness my hand and seal. W. D. [L. s.]" these words may be rejected as surplusage, and the declaration may be in the usual form as upon the custom of merchants.

If the last day of grace upon a bill, be Sunday, the demand must be made on Saturday, and the notice may be given on Monday.

ASSUMPSIT by the indorsee against the indorser of W. Dulany's bill, on Mrs. Eliza Dulany, in favor of the defendant, in these words:—

"Alexandria, 14th August, 1820.

"\$252.71. Four months after date, please to pay to the order of Jesse Brown, \$252.71, and charge the same to your obedient servant, as per value received. Witness my hand and seal. W. Dulany. [L. s.] To Mrs. Eliza Dulany, Alexandria. Accepted, Eliza Dulany."

The declaration was in the usual form, as upon a bill of exchange, drawn according to the usage of merchants, and says nothing of the seal.

Mr. Hewitt, for the defendant, contended that this instrument was not such a bill of exchange as is set forth in the declaration, and that it was not a negotiable instrument.

The COURT (THRUSTON, J., absent,) said that this was a new question, but it appeared to them that the bill was substantially set forth in the declaration, and that it might be given in evidence, and that the words "witness my hand and seal," and the scrawl, made in the place of a seal, might be considered as surplusage.

Mr. Hewitt then objected that the demand on the 16th of December, was too soon, and the notice to the defendant on the 18th, by mail, was too late.

The bill fell due on Sunday, the 17th, which was the last day of grace. The demand, upon the acceptor, who resided in Alexandria, was made on Saturday, the 16th, and notice was given by mail of the 18th to the defendant, Brown, who resided in Washington.

The COURT (THRUSTON, J., absent,) said that the demand was not too soon, nor the notice too late.

Verdict for the plaintiff.

ELIJAH TAYLOR v. ANDREW SCHOLFIELD.

If a promissory note be indorsed in blank after it has been dishonored, with a parol agreement between the indorser and the indorsee that the indorser should not be liable except in the case of the maker's insolvency, it is competent for the defendant to prove such agreement by parol evidence.

ASSUMPSIT, against the indorser of Peter Sanders's note, indorsed by the defendant in blank after it had been protested.

Mr. Taylor, for the defendant, offered parol evidence to show that at the time of indorsement it was agreed that the defendant should not be liable unless the maker should prove to be insolvent. Between immediate parties the defendant may give evidence to contradict the words, "for value received;" *à fortiori* to explain an equivocal indorsement.

Mr. Hewitt, contra. The plaintiff may now fill up the blank indorsement by an absolute assignment, and the Court will consider it as done; then this parol evidence is to contradict the written contract.

THE COURT (THRUSTON, J., absent,) admitted the parol evidence. For if the plaintiff had filled the indorsement made after the dishonor of the note, by an absolute assignment, the defendant would have been permitted to show that such an absolute assignment was contrary to the agreement of the parties; and that it was agreed to be an assignment without recourse.

 THE FRANKLIN BANK v. HIPKINS & ROCHFORD.

In a joint action of debt upon a promissory note, if one of the defendants suffer judgment to go against him by default and a writ of inquiry be executed, he is not a competent witness, upon the issue joined by the other defendant.

DEBT against Lewis Hipkins and Bartholomy Rochford upon their joint promissory note.

Judgment was rendered against Hipkins by default, and a writ of inquiry executed.

On the trial of the issue against Rochford, his counsel, *Mr. Taylor* offered to examine Hipkins as a witness for Rochford; and cited *Chapman v. Graves*, 2 Camp. 333; *Ward v. Hayden et al.*, 2 Esp. Rep. 552.

THE COURT (*nem. con.*) rejected the witness; because the action being joint, the judgment must be joint; and if, upon the trial of the issue against Rochford the verdict should be in his favor, there can be no judgment against Hipkins.

MIAL DORSEY v. ELIJAH CHENAULT.

An averment of a demise from year to year for three years at 120 dollars a year, is not supported by evidence of a demise from year to year for two years at 120 dollars a year, and for one year at 100 dollars a year.

If the jury find for the plaintiff in replevin upon the plea of *non dimisit modo et formâ*, the judgment must be for the plaintiff upon the whole case, although they find for the defendant upon the issue of "no rent arrear."

REPLEVIN. The defendant made cognizance as bailiff of Robert Brocket, for rent arrear, averring that the plaintiff occupied the house for the space of three years ending on the 13th of April, 1819, under a demise from year to year at the rent of \$120 a year; and because 250 dollars, part of 360 dollars for the rent aforesaid, for the three years ending as aforesaid, were due and in arrear, (the residue of the 360 dollars having been paid) he took the goods, &c.

The defendant pleaded,

1st. That the defendant did not take the goods, &c. for that cause, but of his own wrong.

2d. *Non dimisit modo et formâ*.

3d. No rent arrear.

Upon these pleas, issues were joined.

Upon the trial at last term, upon the issue of *non dimisit*, Mr. Taylor, for the plaintiff, contended that the evidence, which was of a demise from year to year for two years at 120 dollars a year, and for one year at 100 dollars, did not support the averment in the cognizance, of a demise from year to year for three years at 120 dollars a year.

Mr. Swann, *contrâ*, contended that it was sufficient in order to support that issue on his part to prove a demise from year to year for two years at 120 dollars a year, and that the defendant had a right to recover for as many years as he could prove at 120 dollars per annum, not exceeding three years.

The COURT (THRUSTON, J., absent,) instructed the jury on the motion of the plaintiff's counsel, that the defendant must satisfy them, by the evidence, that the demise from year to year continued for three years at the annual rent 120 dollars; and that if the rent of one of the three years was at 100 dollars per annum, the demise was not supported as laid.

The jury found verdicts for the plaintiff on the first and second issues with eight dollars damages on each issue; and verdict for the defendant on the third issue; and found the rent arrear to be \$278.83. The defendant moved for a new trial, and the motion was adjourned to this term for argument and consideration.

Mr. Swann, for the defendant. If the defendant has a right

to distrain, at all, he may recover for what is found due although less than the amount distrained for. 6 Bac. Ab. (Gwillin,) 78, tit. Replevin.

As to the first issue (on the plea that the defendant did not take the goods for that cause.) If a man has taken a distress for a thing which he had no right to distrain for, but had a right to distrain for another cause, he may avow for this other cause; per Lord C. J. Holt in *Greenvelt v. Burwell*, Comyns's Rep. 78; *The King v. Dilliston*, Carth. 44; *Crowther v. Ramsbottom et al.* 7 T. R. 654, 657, 658; *Etherton v. Popplewell*, 1 East, 142.

As to the second issue (on the plea of *non dimisit modo et formâ*.) Having proved a demise from year to year for two years at \$120 per annum, and for one year at \$100, we may recover for the two years at \$120, under the demise as laid. *Morris v. Gelder*, 1 Lord Raym. 317; Bac. Ab. Replevin, K; *Harrison v. Barnby*, 5 T. R. 218; *Forty v. Imber*, 6 East, 434, 437.

Upon the third issue, the jury, no doubt, were under a misapprehension that the defendant would be entitled to recover his rent although they found the issue of *non dimisit* for the plaintiff, otherwise it is probable they would have found that issue for the defendant.

A parol lease for more than five years is void by the statute, but if there has been an occupation under such a lease, the courts have construed it to be a demise from year to year during the occupation. If we prove such an occupation for one year only, we have a right to recover for that year; and if the occupation be for three years, it is not necessary to avow for each year separately or to make three avowries.

Mr. Taylor and *Mr. Mason, contra*. The first plea is, substantially, that the defendant took the goods of his own wrong, without such cause of taking as is set forth in the avowry; and the verdict upon the issue on that plea, being found for the plaintiff, is conclusive against the defendant in this action.

The verdict upon the second issue (*non dimisit*) is not inconsistent with the verdict on the third, (no rent arrear) for these might be rent arrear, but not under the demise laid in the avowry.

Although a defendant in replevin may distrain for one cause, and avow for another, yet he must prove the cause for which he avows as it is laid. He must show not only that rent is arrear, but that it was due, at the time of the distress, under the demise averred in the avowry, or his justification is not complete. Upon the issue of no rent arrear, the demise is not in issue; the plaintiff can controvert it only upon the plea of *non dimisit*. There must be a demise, or there could be no lawful distress. It was neces-

Hough v. Smoot.

sary, therefore, for the defendant to aver a demise, and to prove it as laid. Rent arrear alone is no justification.

The COURT (THRUSTON, J., absent,) having taken time to consider, was of opinion that the instruction which they gave to the jury at the trial was correct, and overruled the motion for a new trial. Judgment for the plaintiff.

NEGRO SAMPSON SOMBOY v. SOLOMON LORING.

In trespass *vi et armis* for taking away the plaintiff's son *per quod servitium amisit*, the plaintiff must either prove actual force, or knowledge on the part of the defendant that the young man was under age.

TRESPASS *vi et armis*, for taking away the plaintiff's son and servant *per quod servitium amisit*. Demurrer to the evidence.

Mr. Taylor, for the defendant, contended that the action should have been trespass on the case — not *vi et armis*; but that if trespass *vi et armis* will lie, the plaintiff must prove either actual force, or that he seduced the boy knowingly, that is, knowing the plaintiff's right to his service. But the evidence shows that he did not know it. 2 Chitty on Pleading, 237, 238.

The father has no right to the personal service of his son under age. His only right of possession of his son is for nurture and education. Upon *habeas corpus*, at the request of the father, if the child be of years of discretion, the Court will not order him to be delivered to the father contrary to the will of the child. It is not a question of property.

Mr. Wise, *contra*. In trespass the *scienter* is not material. Taylor v. Rainbow, 2 Hen. & Mun. 423; Knapp v. Salisbury, 2 Camp. 500; Bennett v. Allcott, 2 T. R. 66; 1 Chitty, 95, 124; Tullidge v. Wade, 3 Wilson, 18; Fitz. Nat. Br. 89, 90; Weedon v. Timbrell, 5 T. R. 361; Macfuzzen v. Olivant, 6 East, 387; Bacon's Abr. tit. Master and Servant.

The COURT (THRUSTON, J., absent,) rendered judgment for the defendant, upon the demurrer to the evidence, on the ground that it was necessary for the plaintiff, in this action of trespass *vi et armis*, to prove either actual force, or a knowledge on the part of the defendant that the young man was under age.

GEORGE S. HOUGH v. JAMES H. SMOOT.

An attachment under the Maryland Act of 1795, c. 56, will lie against lands and tenements in Alexandria county.

THIS was an attachment issued by CRANCH, C. J., out of court,

and in vacation, against the lands and tenements in the county of Alexandria, of the defendant, under the Act of Maryland of 1795, c. 69, and the Act of Congress of the 24th of June, 1812, § 4, [2 Stat. at Large, 755.]

Mr. Swann, for the defendant, stated that if the Court should be of opinion that the process would lie, the defendant would give bail and set aside the attachment.

The COURT, (*nem. con.*) upon an examination of the Act of Congress of the 24th of June, 1812, § 4, [2 Stat. at Large, 755,] and the Acts of Maryland of 1715, c. 40, and 1795, c. 56, was of opinion that this process was extended to the county of Alexandria, so far as regards the attachment of lands and tenements.

There was no argument of counsel upon the point.

THE BANK OF THE UNITED STATES v. JOSEPH SMITH.

Upon a demurrer to evidence, the Court cannot render judgment for the plaintiff, if the declaration be substantially defective.

In an action against the indorser of a note which, in the body of it, is made payable at a particular bank, the declaration must aver a demand of payment at that bank.

From the facts, that the note was discounted by the bank at which it was made payable; that the notary, at the request of the bank, presented the note at the store-house of the maker, and demanded payment of his clerk, and that the maker had no balance to his credit, in the bank, on the day the note became payable, the jury cannot infer that the demand of payment was made at the bank, nor that their officers were present at the bank, on that day, with the note, ready to receive the money and give up the note, nor that the officers of the bank did, on that day, turn to their books to ascertain whether the maker had effects in the bank, to pay the note.

ASSUMPSIT against the indorser of Richard Young's promissory note, at sixty days, for \$506.44, dated 17th May, 1817, payable to the defendant, or order, at the office of Discount and Deposit, at Washington.

At the trial, in November term, 1820, when it appeared, in evidence, that the demand of payment was made by the notary at the store of the maker, and no evidence of any demand at the office of discount and deposit,

Mr. Taylor, for the plaintiffs, became *nonsuit*.

Mr. Lear, for the plaintiffs, at the same term, moved the Court to strike out the nonsuit and reinstate the cause, and cited the following authorities: *Chitty*, 263, 264, in a note; *Sanderson v. Judge*, 2 H. Bl. 509; *Berkshire Bank v. Jones*, 6 Mass. Rep. 524; *Woodbridge v. Brigham*, 12 Ib. 403; *Nicholls v. Bowes*, 2 Camp. 498; *Wild v. Rennards*, 1 Ib. 425; *Fenton v. Goundry*, 2 Ib. 656; *Lyon v. Sundius*, 1 Ib. 423; *Herring v. Sanger*, 3 Johnson's Cases, 71; *Saunderson v. Bowes*, 14 East, 500; *Dickerson v.*

Bowes, 16 Ib. 110; *Howe v. Bowes*, 16 Ib. 112; *Huffam v. Ellis*, in the House of Lords, 3 Taunt. 415; *Bowes v. Howe*, 5 Ib. 30; *Foden v. Sharp*, 4 Johns. 183; *Lang v. Brailsford*, 1 Bay's Rep. 222; *Parker v. Gordon*, 7 East, 385, and *Fenton v. Goundry*, 13 Ib. 459.

Mr. Swann, *contrà*, cited 4 Johnson's Rep. 183, *in notis*, and the cases there cited.

The COURT, (MORSELL, J., *contrà*,) considering the question as very important, and that the cause could not be brought before the Supreme Court, upon a nonsuit, reinstated the cause, without prejudice to the question intended to be argued upon the sufficiency of the demand to charge the indorser.

The cause came on for trial again at May term, 1821, when the defendant demurred to the evidence, and the plaintiffs joined in demurrer.

At November term, 1821, the demurrer was argued by

Mr. Swann and *Mr. Hewitt*, for the defendant, and *Mr. Lear*, for the plaintiffs.

Mr. Lear cited, in addition to the other cases, *Ambrose v. Hopwood*, 2 Taunt. 61; *Saunderson v. Bowes*, 14 East, 499; and, at May term, 1822, he cited *Gibson v. Hunter*, 2 H. Bl. 187, 211, as to the inferences which the jury may draw upon a demurrer to evidence; and Tidd, Pr. 914, that, on demurrer to evidence, no advantage can be taken of error in pleading; and, as to sufficiency of notice, Chitty on Bills, 234; *Reedy v. Seixas*, 2 John. Ca. 337; *Smith v. Whiting*, 12 Mass. Rep. 6, and *The Bank of the United States v. Norwood*, 1 Harris & Johnson, 423.

The COURT, having taken time for consideration, delivered the following opinion, (THRUSTON, J., absent.) This is an action of *assumpsit* against the indorser of Richard Young's promissory note, "payable at the office of Discount and Deposit, Washington, without offset."

The declaration avers that Richard Young, on the 17th of May, 1817, "made his promissory note, by which he promised to pay, sixty days after date, to the order of the said Joseph Smith, 506 dollars and 44 cents, for value received, payable at the office of Discount and Deposit, at Washington, without offset," &c., and sets forth the indorsement in the usual form, and the plaintiffs aver that, at the expiration of the said sixty days, the time limited, that is to say, on the 19th day of July, 1817, they presented the said note to the said maker, for payment, who then and there refused to pay the same, of which said indorsement, so made on said note as aforesaid, and the said non-payment, he, the said defendant, afterwards, to wit, on, &c. had notice, by means whereof, &c.

Upon the trial of the general issue, the defendant demurred to the evidence, which was as follows: after setting forth the promissory note and the indorsement by the defendant, and that it was discounted at the office of Discount and Deposit of the Bank of the United States, at Washington, the demurrer states the protest, (the facts stated in which were admitted to be true,) and in which Mr. Nourse, the notary, stated, that on the 19th of July, 1817, at the request of the president and directors of the office of Discount and Deposit of the Bank of the United States, in the city of Washington, he presented, at the store of Richard Young, the original promissory note, and demanded payment of his clerk, whereunto he replied, that Mr. Young was not within, and that he could not pay it. That the plaintiffs then offered, in evidence, the deposition of the said Mr. Nourse, in which he testified, that on the 19th of July, 1817, he put into the post-office of Washington city, after the closing of the mail for that day, a letter directed to Joseph Smith, Alexandria, informing him that a note, drawn by Richard Young, dated 17th of May, 1817, for \$506.44, and by him and W. M. Chick indorsed, was due and had not been paid. That the plaintiffs also offered, in evidence, the deposition of Samuel J. Potts, bookkeeper of the office of Discount and Deposit, at Washington, dated December 1st, 1820, in which he states, that on the 19th of July, 1817, when the note of Richard Young, indorsed by the defendant and W. M. Chick, became due, there was no balance to the credit of the drawer or either of the indorsers, on the books of the said office.

In the argument upon the demurrer, it was contended, on the part of the defendant, that it was not necessary for the plaintiffs to prove that payment was demanded of the maker of the note at the office of Discount and Deposit, at Washington, where the note was, on its face, made payable; and that, from the evidence given at the trial, as stated in the demurrer, the jury could not infer a demand at that place. To this the plaintiff's counsel answered, that when a note is made payable at a bank, it is only necessary for the officers of the bank to turn to the books of the bank, and if they find no money to the credit of the maker, they need not make any demand of payment; and for this, he cited the case of *Saunderson et al. v. Judge*, 2 H. Bl. 509, in which case there was a memorandum at the foot of the note, signed by the maker, in which he stated that he would pay it at the house of Saunderson & Co., with whom he had a cash account. Before the note became payable, it became the property of Saunderson & Co., who were bankers. No demand of payment was made of the maker. The Court held, that as they, at whose house the note was to be paid, were themselves the holders of it,

it was a sufficient demand for them to turn to their books and see the maker's account with them, and a sufficient refusal to find that he had no effects in their hands. The Court also held, that, as the place of payment was not inserted in the body of the note, it was not necessary, in the declaration, to aver a demand at that place.

He also cited the case of *The Berkshire Bank v. Jones*, 6 Mass. Rep. 524, in which Mr. C. J. Parsons says, "the note was payable on a day and at a place certain; and the place is the bank—the plaintiff's bank. A demand of payment need not be made at any other place, and if the holder of the note is at the bank, on the prescribed day, ready to receive the money, if the maker be there, it is enough for him; and if the maker does not come to the bank, or direct the payment there, he has broken his promise, and no other notice to him is necessary. In the case at bar, as the plaintiffs held this note, we must presume it was in their bank, and there it was made payable. They were not to look up Gleson, (the maker,) or to demand payment of him at any other place. The defendant, by his indorsement, guaranteed that, on the day of payment, the maker would be at the bank and pay the note, and that if he did not pay it there, he agreed that he would be answerable in a suit at law, without previous notice of the default of the promisor." (The defendant had waived notice, but not demand.) "If, on the trial, the plaintiffs can show that, on the day of payment, the note was in the bank, and that the servants or officers of the plaintiffs were there during the usual bank hours, to receive payment and give up the note, they will be entitled to recover, as, by the terms of the note, they were not holden to demand payment but at the bank, which was impracticable, through the default of the maker; and by the defendant's waiver, he cannot claim notice."

The plaintiff's counsel also cited the case of *Ward & Woodbridge v. Brigham*, 12 Mass. Rep. 403, which recognizes the law as laid down in the case of the *Berkshire Bank*.

The Court may admit the law to be correctly stated in these cases, and yet the plaintiffs may not be entitled to judgment in the present case.

In order to support an averment of a demand at the bank, it may be sufficient to prove that, on the day for payment of the note, the plaintiffs turned to their books and found that the maker of the note had no effects in their hands, or that they were the holders of the note, on that day, and were ready, at their bank, during the usual bank hours, to receive the money and give up the note; but such evidence will not supply the want of an averment in the declaration that the demand was made at the bank.

The Bank of the United States v. Smith.

The judgment of the Court must be given upon the whole record; and if the Court see such a defect in the declaration as would be good ground to arrest the judgment, or as would be a fatal defect upon general demurrer, they must refuse to render judgment for the plaintiffs, upon the demurrer to the evidence.

The declaration states that the note was made payable at the office of Discount and Deposit, at Washington. The demand alleged in the declaration is simply a demand on the maker. It is not averred to be according to the tenor and effect of the note; nor does the averment contain any words from which it can be inferred that the demand was made at the office of Discount and Deposit.

In the case of *Saunderson v. Bowes*, 14 East, 507, it was decided, that when a note is (in the body of it) made payable at a particular place, a demand at that place is a condition precedent; and that the want of an averment of such a demand, in the declaration, is fatal upon general demurrer, even in an action against the maker of the note. The same point was again decided in the case of *Dickinson v. Bowes et al.* 16 East, 110, and recognized by the House of Lords, in the case of *Huffam et al. v. Ellis*, 3 Taunt. 415, in 1811, upon a writ of error, where the bill was accepted, payable at a particular place, that is, at the house of certain persons using the names, style, and firm of Kensington, Styan, and Adams. The plaintiffs, in their declaration, averred that "the said bill was shown and presented to the persons so using the names, style, and firm of Kensington, Styan, and Adams, for payment thereof, according to the tenor and effect of the said bill, and the said acceptance thereof, and the several indorsements so made thereon." The judgment in the King's Bench was for the plaintiffs; and, upon the writ of error, it was argued that the averment could not be true unless it was presented for payment at the place where, by the tenor of the acceptance, it was made payable; and is equivalent to a direct averment thereof, in terms. The judgment of the King's Bench was affirmed, upon the ground that the declaration did substantially contain an averment that the demand was made at the place where, by the acceptance, it was made payable.

The Court is further of opinion, that there is no evidence, stated in the demurrer, from which the jury can infer that the demand was made at the bank; nor that the plaintiffs, by their officers, were present at the bank on the day of payment, with the note, ready to receive the money and give up the note; nor that the officers of the bank did on that day turn to their books to ascertain whether the maker had effects in bank to pay the note.

We are therefore of opinion that judgment, on the demurrer, must be rendered for the defendant.¹

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SAMUEL TURNER v. HENRY FOXALL.

In an action of slander, if the declaration contain some good, and some bad, counts, the Court will refuse a general instruction to the jury that the plaintiff cannot recover without proof of the facts stated in the good counts; the question whether the other counts are, or are not, good, being properly a question arising upon a motion in arrest of judgment.

Words, spoken in relation to the credit of a holder of shares in the joint stock of a boat, are actionable if special damage thereby be alleged in the declaration; but the averment of such special damage is not sufficient to support the action without the averment of a colloquium respecting the plaintiff as a shareholder in the boat, and that it was a business requiring credit.

In mitigation of damages, the defendant may give evidence of the general reputation of the plaintiff's want of punctuality in payment of his debts.

If one of the counts be bad, and the verdict be general, the judgment must be arrested.

Handwriting cannot be proved by comparing the paper in dispute with other papers acknowledged to be genuine.

If a witness upon his cross-examination has sworn falsely, in the opinion of the jury, upon an immaterial point, it is competent for them to give their verdict upon his testimony in chief upon other points corroborated by other testimony.

After the jury has retired to consider of their verdict the Court will not instruct them upon any matter at the motion of either of the parties. If the jury asks instruction in matter of law the Court will give it.

A motion in arrest of judgment, and for a new trial, may be made at the same time, but the motion in arrest will be first heard.

THIS was an action of slander, for words spoken of the plaintiff. The declaration contained four counts.

1. The first count avers that the plaintiff at the time, &c., was engaged with a certain John Eveleth, and others, in the building of a boat for passage and transportation, as a shareholder therein, and always ready, able, and willing to pay his share of the capital stock in the said business and boat, and was in good credit, and always able and willing to pay all his just debts. That the defendant knowing the premises, intending to bring the plaintiff into discredit and disgrace with the persons concerned in building the boat, and to exclude the plaintiff from any further share in the boat, and to deprive him of the share which he then held, &c., in a certain conversation which the defendant had with the said John Eveleth, of and concerning the plaintiff as a person concerned in the said boat, and as a stockholder therein, and of and concerning the plaintiff's interest therein, &c., and of and concerning the plaintiff's circumstances and character, spoke, in the hearing of the said John Eveleth, the words following, of and concerning

¹ This judgment was reversed by the Supreme Court of the United States, in 1826. 11 Wheat. 171.

the plaintiff, and his share and interest in the boat and business, and of the plaintiff as a shareholder therein, and of the sum which he was to pay towards the stock thereof, and of and concerning his character and circumstances, namely, "He will never pay his part. If he had eight times eight thousand dollars, it would not pay his debts."

2. The second count, after stating a similar *colloquium*, charges the following words addressed to the said John Eveleth, namely. "Did you ever know him (the plaintiff) speak except in a low whisper calculated to deceive? He (the plaintiff) will lie, and cheat his creditors."

3. The third count, avers that in another conversation with Eveleth concerning the plaintiff, his character, circumstances, integrity, solvency, ability, and willingness to pay his debts, the defendant said to the said Eveleth, the following words of and concerning the plaintiff as aforesaid; "If he had eight times eight thousand dollars it would not pay his debts."

4. The fourth count, after stating another *colloquium* like that in the third count, with Eveleth, charges that the defendant said, "Did you ever hear him speak except in a low whisper calculated to deceive? He is a deceptive fellow. He will lie, and cheat his creditors. He is a lying cur. He is a lying puppy." By means of the speaking of which several false, scandalous, and malicious words, the said plaintiff became and was much injured in his good name, &c., and hath been deprived of his credit, and was by means thereof so far injured in the good esteem and opinion of the citizens of the District of Columbia, and of the said John Eveleth, that he was wholly excluded by the said John from all share in the said boat and the stock and shares thereof, and refused to be allowed to take any further interest therein, and was thereby deprived of the profits of the said undertaking, boat, and stock, of great value, to wit, of the value of \$1,500; and is otherwise greatly injured, &c., to his damage \$5,000.

Upon the trial on the general issue, at December term, 1818, in Washington,

Mr. Key and Mr. Caldwell, for the defendant, contended that none of the words charged in the declaration were actionable *per se*, and moved the Court to instruct the jury, that if they should be of opinion from the evidence that the plaintiff sustained no special damage by not being permitted to participate more largely in the stock of the boat, the plaintiff cannot recover.

They contended that the words spoken of the pecuniary credit of a man are only actionable when spoken of a trader. *Morris v. Langdale*, 2 Bos. & Pul. 284; *Ludwell v. Hole*, *Ld. Rayn.* 1417.

 Turner v. Foxall.

Mr. Wiley and *Mr. Jones*, *contrà*. The plaintiff, so far as he was concerned in the boat, was a trader. It is not necessary to prove him to be a merchant. 4 Har. & McHenry, 537, 540. The question whether the words are actionable *per se* should be reserved for a motion in arrest of judgment, and is not to be decided upon the trial.

The COURT (*nem. con.*) refused to give the instruction.

THRUSTON, J., thought the words actionable as having been spoken of the plaintiff in regard of his holding the stock in the boat.

CRANCH, C. J., and MORSELL, J., were of opinion that if the jury should be satisfied that the plaintiff was, in consequence of the words spoken, prevented from increasing his share in the stock, it was sufficient to support the action.

MORSELL, J., was also of opinion that the words were not actionable without proof of the special damage.

CRANCH, C. J., was inclined to the same opinion, but not being called upon for any opinion upon that point, gave none.

The COURT (*nem. con.*) permitted the defendant, in mitigation of damages, to give evidence that the plaintiff was generally reputed to be not punctual in the payment of his debts.

The jury found a general verdict for the plaintiff, with \$1,000 damages.

Mr. Key, for the defendant, moved in arrest of judgment, and for a new trial.

Mr. Jones, for the plaintiff, objected that both motions could not be made at the same time.

Mr. Key, answered, that the practice of this Court was to hear the motion in arrest first, and if that should be overruled, then to hear the motion for a new trial.

Upon the motion in arrest of judgment,

Mr. Redin and *Mr. Caldwell*, for the defendant, contended,

1. That the words were not actionable *per se*, for they neither charge the plaintiff with a crime, nor a contagious disease. *Holt v. Scholefield*, 6 T. R. 694; *Holt on Libels*, 189, 222.

2. The words are not charged as having been spoken of the plaintiff in regard to any office, or as being a trader, or as being concerned in any trade or occupation by which he made a living, or profit, or any other business which could be injured by words affecting his credit. *Morris v. Langdale*, 2 Bos. & Pul. 287; *Todd v. Hastings*, 2 Saund. 307; *Davies v. Jones*, T. Raym. 62; *Brown v. Hook*, 1 Brownlow, 4; *Vicary v. Burns*, Styles, 213, 217; *Savile v. Jardine*, 2 H. Bl. 532; *Holt on Libels*, 222.

The third and fourth counts have no *colloquium* respecting the plaintiff as a shareholder in the boat, and as the special damage

was incurred by him only in that character the plaintiff cannot recover on those counts; and he cannot recover upon the first and second counts, because the special damage alleged, is not stated in those counts; and because the plaintiff has not averred that he made gain, or got a living by the boat.

3. The special damage is not sufficiently laid. He avers that he was excluded from all share in the boat, &c. If he was wrongfully excluded by Eveleth he had his remedy by action against him, and therefore cannot recover in this action for that injury. *Morris v. Langdale*, 2 Bos. & Pul. 288; *Vicars v. Wilcox*, 8 East, 1. As to the refusal to permit the plaintiff to increase his share in the boat, no request is averred, and without a request he could sustain no damage. *Wallis v. Scott*, 1 Strange, 89; Com. Dig. Tit. Pleader, C.; *Bach v. Owen*, 5 T. R. 409; *Peck v. Methold*, 3 Bulstr. 293; *Devenly v. Welbore*, Cro. El. 85; *Birks v. Trippet*, 1 Saund. 33. If either count is bad, the judgment must be arrested; for the verdict is general, and *non constat* that the jury has not found the damages upon the bad count. 6 Bac. Ab. (Guillim) 219; 8 Went. 287; 1 Har. Ent. 669; Bul. N. P. 7. As to what is to be considered as special damage. 1 Saund. 243, in a note.

Mr. Ashton and *Mr. Jones*, *contrà*. The English law of slander is not applicable to this country. Words tending to scandalize and bring the plaintiff into disrepute are here actionable *per se*; and if special damage upon one set of words only is proved to the value of ten cents only, it justifies the jury as to all the damages they may find for other words not actionable. If there be one good count the judgment cannot be arrested. *Neale v. Lewis*, 2 Bay, 204. It was not necessary to prove that the plaintiff was a merchant to make actionable the words spoken of his credit. In this country every man depends more or less on his credit, and words injuring his credit are actionable *per se*. The damages stated in the conclusion of the declaration are applicable to all the counts. The Court must presume that every thing was proved which it was necessary to prove, in order to sustain the verdict. The loss of the use of the plaintiff's share in the boat is a sufficient special damage. After verdict a request will be presumed, if it were necessary to sustain the verdict. 1 Sellon, 499, 500.

The *colloquium* in the first and second counts and the averment of special damages apply to the third and fourth counts, and will support the verdict on those counts, although the words in the third and fourth counts are not actionable *per se*.

Words, spoken of a person in any business, and which may injure him in such business, are actionable without proof of special

damage. It is not necessary to aver that the plaintiff made gain or got his living by such business. It was a business which required capital, and therefore required credit. It was not necessary therefore to aver special damage.

The exclusion of the plaintiff from the share in the boat was not a tortious act, for which he could maintain an action.

Mr. Key, in reply. The words, to be actionable, must be applicable to his business, and must tend to injure him in his business. Words spoken of a man's pecuniary credit are not actionable unless he gets his living by a business requiring pecuniary credit. The *colloquium* in the first and second counts cannot be transferred to the third and fourth. There is nothing to connect them. The special damage therefore cannot refer to these counts. 1 Chitty, 397; 2 Chitty, 261, in note; *Crafts v. Boyd*, 1 Saund. 246, in note; *Morris v. Langdale*, 2 B. & P. 287; *Vicars v. Wilcox*, 8 East, 1; 1 Chitty, 389.

The COURT (THRUSTON, J. *contrà*,) arrested the judgment, on the ground that the third and fourth counts were bad for want of a *colloquium* averring a trade or business requiring credit. The plaintiff, by leave of Court, filed a new declaration.

The cause was afterwards, at April term, 1821, transferred to Alexandria county to be tried, upon the defendant's suggestion and affidavit that he could not have a fair trial in Washington. At November term, 1821, at Alexandria, the jury found a verdict for the plaintiff and \$1,000 damages, and a new trial was granted on the prayer of the defendant, upon payment of the costs. The cause came on for trial again in Alexandria, at May term, 1822.

The defendant attempted to prove that the plaintiff's witness, John Eveleth, had perjured himself, in this cause, by swearing that he did not write a certain letter, purporting to be a letter from one Benjamin F. Clarke, dated at Baltimore, May 15, 1821, to Mr. Foxall, inquiring about the reputation of the person who had built a mud-machine for the corporation of Georgetown, who was in fact the same John Eveleth; and in order to prove the letter to be in the handwriting of Eveleth, the defendant produced another letter which the witness, Eveleth, admitted to be in his handwriting, and called Daniel Kurty, as a witness skilled in handwriting, and asked him to examine them and say whether the one handwriting was not like the other.

The plaintiff's counsel objected to this kind of evidence, and the COURT (THRUSTON, J., absent,) said that the evidence was not proper. It was mere comparison of handwriting, which is not evidence. Phillips, in his *Treatise on Evidence*, p. 371, says, "It is an established rule of evidence that handwriting cannot be proved by comparing the paper in dispute with any other papers

acknowledged to be genuine." After the argument of counsel was closed and before the jury retired from the bar to consider of their verdict, they proposed to the Court the following written question: "Should the jury believe that the defendant is guilty of the slander, and also believe that the witness wrote the letter from Baltimore, can they find damages on his, and other evidence?"

To which the COURT (THRUSTON, J., absent,) gave the following answer: "The jury are the sole judges of the credibility of the witnesses, and to decide upon the whole evidence whether the defendant is guilty of uttering and publishing the slanderous words charged in the declaration." This opinion was given without any argument or observation from the counsel in the cause. The defendant's counsel were not present. After they came in, and after the jury had retired to their room, *Mr. Key*, one of the defendant's counsel, prayed the Court to add to their instruction to the jury, the following words: "But the jury cannot find the defendant guilty of speaking the words, unless there is credible testimony of that fact; and if they believe that the only witness, proving the words to be spoken, has committed perjury, in his evidence, they cannot find for the plaintiff."

The COURT refused to make this addition to the instruction which they had given to the jury; and MORSELL, J., said that the testimony of a witness, who may have sworn falsely upon his cross-examination upon a collateral immaterial point, may, if corroborated by other evidence, be received by the jury, and a verdict may be found upon his and such other corroborating evidence.

This was not denied by CRANCH, C. J., as being the opinion of the Court; but the Court said they would not send the instruction asked by the defendant's counsel after the jury had retired, nor any other instruction than the one given.

The jury again found a verdict for the plaintiff with \$1,000 damages.

Mr. Key and *Mr. Taylor*, for the defendant, moved for a new trial, and as reasons therefor, alleged,

1. That the Court refused to instruct the jury, after they had retired to consider of their verdict, as requested by the defendant's counsel.

2. That one of the jurors, after they had been permitted to separate, under a charge, from the Court, not to hold any conversation on the subject with any person, did hold a conversation with one of the plaintiff's witnesses upon the subject of Eveleth's credibility.

1. The Court, instead of instructing the jury as they did, should

have instructed them that if they believed that Eveleth had perjured himself in respect to the letter, they could not find their verdict for the plaintiff upon his testimony, although corroborated in regard to the point in issue. *The King v. Atwood*, M'Nally, 197; Eveleth was perjured in this cause. *Falsus in uno, falsus in omnibus*, 4 Inst. 279; *The St. Nicholas*, 1 Wheat. 430; Gilbert's Ev. 136; 3 Cain. 12.

2. Upon the misbehavior of the juror, he read the affidavit of a witness who heard the juror say that he believed Eveleth, the witness, was perjured in relation to the letter of Benjamin F. Clarke, but that he had founded his verdict for the plaintiff on the said Eveleth's testimony. Trials *per pais*, 12; *Knight v. Inhabitants of Freeport*, 13 Mass. Rep. 220.

Mr. Jones and Mr. Swann, contra. Here have been three verdicts against the defendant, and the statute of Virginia of the 19th of December, 1792, § 34, forbids the Court to grant to the same party more than two new trials.

1. If the witness swore falsely in an immaterial point it only goes to his credit, of which the jury is to judge. They may, especially if corroborated, believe him upon other points.

2. If the Court had given the instruction asked by the defendant's counsel after the jury had retired, it would have, in effect, been an exclusion of the testimony of the witness. The alleged false swearing was upon a point wholly immaterial to the issue, and the witness could never have been convicted of perjury upon that false swearing. *Rex v. Teal*, 11 East, 305, 309.

Mr. Key, in reply. The Court is not limited to any number of new trials. *Goodwin v. Gibbons*, 4 Burr. 2108; *Tindal v. Brown*, 1 T. R. 171.

The point, upon which the false swearing was, was a material point; because the character of Eveleth was in issue, and the letter was written to obtain something in support of it.

The COURT (THRUSTON, J., absent, but being of the same opinion) refused the new trial, because the defendant had, in effect, had the full benefit of two new trials. Each trial had been full and fair, and three verdicts had been rendered against him. Because the Court was not satisfied that any of the jurors had been guilty of any improper conduct; and because the Court was still of opinion that the jury, if from the corroborating evidence they were satisfied upon the whole evidence that the defendant was guilty of speaking the words as laid in the declaration, did right in giving their verdict for the plaintiff, although they may have believed that the witness wilfully swore falsely in regard to the letter.

WORMSLEY v. BEEDLE, special bail of Rice.

After *scire facias* returned, the bail will be exonerated if the principal be confined in the Penitentiary of one of the States before any execution returned against him, and so continue to be confined until the return of the *scire facias*.

Mr. Mason, after the return of the *scire facias*, moved the Court to exonerate the defendant, who was special bail for one J. B. Rice, on the ground that the principal is now in prison in Virginia on a sentence for an offence against the United States; and cited the following authorities: —

The case of the bail of Peter Vergen, 2 Strange, 1217, where a prisoner under sentence of transportation was brought up to be surrendered in discharge of his bail; *Sharp v. Sheriff*, 7 T. R. 226, S. P., and Lord C. J. Kenyon said, it is what the bail are entitled to ask *ex debito justitiæ*; *Wood v. Mitchell*, 6 T. R. 247, where the Court permitted an *exoneretur* on the bail-piece because the defendant was under sentence of transportation and actually on board ship, ready to sail; *Merrick v. Vaucher*, 6 T. R. 50, S. P., where the principal was an alien sent out of the kingdom under the alien bill; *Trinder v. Shirley*, Doug. 45, S. P., where the principal had become a peer, and it was no longer in the power of the bail to surrender him; *Fowler v. Dunn*, 1 Johns. Ca. 28, S. P., where the principal was sentenced to the State Prison for life; and *Catcart v. Cannon*, 4 Burr. 2034, where the principle is admitted by Lord Mansfield.

The Court (*nem. con.*) ordered the *exoneretur* to be entered, the principal being confined in the Penitentiary of Virginia before any execution returned against him, and continuing therein until the present time.

ISAAC ENTWISLE'S ADMINISTRATOR v. DANIEL BUSSARD.

If the plaintiff delivers his *fieri facias* to the marshal, and dies, and the marshal levies it upon the goods of the defendant, he has a right, under the law of Virginia, to give a forthcoming bond payable to the deceased creditor; and such bond will support a judgment on motion by the administrator of the creditor.

Mr. Swann, for the plaintiff, moved for execution upon a forthcoming bond given by the defendant to Isaac Entwisle, who had died after delivering the *fieri facias* to the marshal and before the levying of it upon the goods of the defendant, for the forthcoming of which, on the day of sale, the bond was given.

The Act of Virginia, concerning executions, of the 10th of December, 1793, § 13, (P. P. 298,) after enacting that the property

of the defendant's goods shall not be bound by a *fieri facias* until it shall be delivered to the officer, provides "that if the owner of such goods and chattels shall give sufficient security to such sheriff or officer, to have the same goods and chattels forthcoming at the day of sale, it shall be lawful for the sheriff or officer to take a bond from such debtor and securities, payable to the creditor, reciting the service of such execution, and the amount due thereon with condition to have the goods or chattels forthcoming at the day of sale," &c.; and the act further provides that if the bond shall be forfeited, and returned to the clerk's office, it shall have the force of a judgment, and the Court may award execution thereon, upon motion and ten days' notice.

Mr. Swann, contended that if the marshal could, after the creditor's death, proceed to levy the execution upon the defendant's goods, the defendant was entitled to the correlative right of giving a forthcoming bond; which bond, by the express provision of the law, must be made payable to the creditor; and the only creditor whom the marshal could know, was the plaintiff named in the execution. Besides, the defendant is estopped from denying the existence of the obligee; and it is unjust that, having had the full benefit of the bond himself, he should now seek to avoid it.

Mr. Taylor, contrà. The bond, as a contract, must have two parties; a bond given to a dead man is void, for want of parties. If considered as a judgment confessed, it is erroneous because there was no plaintiff. The defendant is not estopped to plead that there was no such person *in rerum naturâ*.

Mr. Swann, in reply. The bond is a part of the process of execution. When an execution is begun, the death of the parties makes no difference; it must be finished; and for that purpose the parties are still, in law, considered as alive. The bond was as lawful as the execution, and the right to give it and relieve the property was appendant to the execution.

The COURT (MORSELL, J., *contrà*, and CRANCH, C. J., doubting,) refused to quash the bond, and awarded the execution upon it.

TRIPLET & NEALE v. VAN NAME *et al.*

The vessel, and the cargo in the hold, are not liable to contribution for the deck-load thrown overboard for the general safety.

BILL in equity for contribution from the vessel, and remaining part of the cargo, for a part of the deck-load thrown overboard for the general safety of vessel and cargo, in a voyage from New York to Alexandria, D. C.

Mr. Mason, for the defendant, contended that the cargo under deck is not liable for average of deck-load thrown overboard for the preservation of the whole. *Smith v. Wright et al.* 1 Caines' N. Y. Term Reports, 43; *Indah v. Randall*, 2 Caines' Cases, 324; *Lenox v. United Insurance Company*, 3 Johns. Cases, 178; *Stevens on Average*, 14, 18, 50; Code Napoleon.

Mr. Taylor, contra. This is a coasting voyage, and the question depends upon the usage of the trade. The general principle is, that the vessel and remaining goods shall contribute for any part of the cargo thrown overboard for the safety of the residue. There is no reason for excepting the deck-load, unless the vessel is thereby overladen; in which case the master only is liable. The error has arisen from applying the law of insurance to a mere question of contribution. But the law of insurance is founded on the fact that a deck-load is liable to greater risk than a cargo under deck. *Beawes, Lex. Merc. Tit. Salvage.*

The Code Napoleon is the municipal law of France, and is no evidence of the general maritime law upon this particular case. *Mr. Taylor* also cited a MS. note of the case of the *Sloop Matilda*, from New York to Alexandria, D. C., which was submitted to arbitrators, James Bruce Nichols, an insurance broker, and George Coleman, a master of a vessel, who decided it to be a proper case for average, it not appearing that the vessel was overloaded.

The COURT, having taken time to consider, in the vacation, was of opinion that it was not a case of average, and dismissed the bill.

CIRCUIT COURT OF THE UNITED STATES.

OCTOBER TERM, 1822, AT WASHINGTON.

SMITH & MORGAN v. CHARLES GLOVER.

In the county of Washington, D. C., according to the usage and practice of the banks and notaries public in that county, demand of payment of a promissory note, and notice to the indorser on the day after the last day of grace, is not too late to charge indorsers resident in that county having a knowledge of such usage and practice at the time of indorsing.

ASSUMPSIT, against the indorser of the promissory note of Cruikshank and Owens, for \$216.85 at four months after date, due 13th-16th of June, 1817. The demand and notice were on the 17th.

Verdict for the plaintiff, subject to the opinion of the Court on a case which stated, that it had for many years been the usage of the banks and notaries public in the county of Washington to demand payment of promissory notes on the day after the last day of grace, and, if not paid, to give notice to the indorsers on the same day, although the usage had been different in the other county in this district, and in the commercial cities of the United States generally, where the usage was to demand payment and give notice on the last day of grace. That in 1816, and at other times, payment of notes drawn or indorsed by the defendant had been demanded on the day after the last day of grace; and that the defendant had been a director of one of the banks in Washington county. That the makers of the note, Cruikshank and Owens, had made a deed of assignment to the defendant of all their stock in trade and the debts due to them, in trust to sell the goods and collect the debts, and out of the proceeds thereof, to indemnify himself against all his indorsements for them, and to divide the surplus among his other creditors *pari passu*.

The Court rendered judgment for the plaintiffs.

CASSAWAY v. JONES.

If an indorser, after suit brought against him, tell a stranger, that he is ready and willing to pay the debt, if he knew the amount of the costs, and to whom to pay it, this

Thorp v. Orr.

will not dispense with proof of demand and notice, or of the defendant's knowledge that he was discharged by the want of due demand and notice; nor with proof of the defendant's handwriting on the note, although the note was filed in the clerk's office before the supposed acknowledgment; nor will it be sufficient evidence to sustain any of the money counts.

ASSUMPSIT, against the indorser of a promissory note.

The defendant after the suit was brought, told a stranger (Z. W.) that he was ready and willing to pay the debt if he knew the amount of the costs.

Mr. Key, for the plaintiff, contended that the promise to pay, is *primâ facie* evidence of due demand and notice, and of the defendant's indorsement; the note having been filed in the clerk's office before the acknowledgment, although there was no evidence that the defendant had seen the note.

Mr. Lear, *contrâ*. The burden of proof is on the plaintiff to prove due demand and notice, or of a promise to pay, made by the defendant with a knowledge of his discharge by the want of demand and notice. *Good v. Sprigg*, in this Court at June term, 1819, (*ante*, 172.)

The COURT (*nem. con.*) said that the note could not be given in evidence upon that testimony.

But the COURT (MORSELL, J., *contrâ*.) at the request of the plaintiff's counsel, told the jury that the acknowledgment was evidence upon the money counts.

The jury thereupon found a verdict for the plaintiff, for \$120, (the amount of the note,) upon the count for money had and received.

The COURT, however, upon further consideration, at the motion of the defendant's counsel, granted a new trial, being of opinion that the last instruction given at the trial was erroneous.

The plaintiff had leave to amend his declaration.

 THORP v. ORR.

It is no valid objection to a deposition taken under the Act of Congress, that its envelope is not directed to "the Court," if it be directed to "the judges" of the Court.

It is sufficient evidence that the deposition was "sealed up" by the magistrate, if the envelope is sealed, and the name of the magistrate written across the seal.

It is not competent for the plaintiff to give parol evidence that the defendant saw and acknowledged the balance stated in the plaintiff's ledger, without producing the ledger itself; a copy of the account is not competent evidence.

Mr. Key, for the defendant, objected to a deposition taken under the Judiciary Act, that it was not directed to this Court; it was directed "To the judges of the Circuit Court for the District of

Mackbee v. Griffith.

Columbia, Washington city." He also objected that it did not appear that it was sealed up by the judge who took it. He only certified that he intended to seal it up. The envelope was sealed with two seals, and the name of the judge written over each seal.

The COURT (THRUSTON, J., absent,) overruled both objections. The deposition stated that the deponent showed the plaintiff's ledger to the defendant, (the balance being \$107,) who acknowledged it to be correct. It stated also that the paper annexed to the deposition, was a true copy of that account, and that the deponent afterwards showed the balance, being \$107, to the defendant, who promised to pay it.

The COURT (THRUSTON, J., absent,) rejected that part of the deposition.

Non-pros. Mr. Lear, for the plaintiff.

MAYE v. CARBERY.

Judgment by default, for not producing at the trial a paper which the defendant has been notified to produce, cannot be rendered unless there has been a previous order of the Court to produce it, founded upon a motion and notice.

Before secondary evidence of a written instrument can be given, the Court must be satisfied by the affidavit of the party offering it, or otherwise, that the supposed original paper did once exist, and that it is not in his power to produce it.

REPLEVIN. Rent arrear, and issue.

The plaintiff, having given notice to the defendant to produce the original, offered to read in evidence to the jury, a copy of a paper in the handwriting of the deceased subscribing witness.

Mr. Tancy, for the defendant, objected; stating that his client had not the original.

The COURT (*nem. con.*) decided that the plaintiff was not entitled to judgment by default, under the 15th section of the Judiciary Act of 1789, [1 Stat. at Large, 73,] because he had not given notice of a motion to the Court for an order to compel the defendant to produce the paper. And that the plaintiff must lay the foundation for his secondary evidence, by satisfying the Court by his own affidavit, or otherwise, that the original once existed, and that it was not in his power to produce it.

ELIZABETH E. MACKBEE v. MARIA GRIFFITH.

A woman who keeps prostitutes for gain, cannot recover in an action against them for boarding and lodging.

INDEBITATUS ASSUMPSIT and *quantum meruit*, for boarding and lodging.

Negro Humphries v. Tench.

The COURT, upon the motion of *Mr. Key* and *Mr. Lear*, for the defendant, instructed the jury, that if they should be satisfied by the evidence, that the plaintiff kept a bawdy-house, and that the defendant lived with her for the purposes of prostitution, and that the plaintiff was to derive any profit from the prostitution of the defendant, the plaintiff could not recover in that action.

Mr. Jones, for the plaintiff, did not object to the instruction.

 WHITE v. THE CORPORATION OF WASHINGTON.

The warrant of a justice of the peace for the violation of a by-law, must set forth the offence substantially within the purview of the by-law.

This was an appeal from the judgment of a justice of the peace for the penalty of ten dollars, upon a warrant for running a horse in one of the streets of Washington, contrary to the by-law. By the by-law of the 9th of December, 1809, it is enacted "that it shall not be lawful for any person or persons to run an animal of the horse kind, in any of the streets or avenues in the city of Washington, within three hundred yards of any house or building in said city, under a penalty of ten dollars for each offence."

Neither the warrant nor the judgment of conviction stated the running to be "within three hundred yards of any house or building in the said city."

The COURT (THRUSTON, J., *contrà*,) was of opinion, that the charge was too vague, and did not describe an offence under the by-law, and reversed the judgment.

 NEGRO HUMPHRIES v. TENCH.

Depositions taken in another suit for freedom, by one of the same family, cannot be read in evidence as hearsay respecting the condition of their common ancestor.

PETITION for freedom. The defendant offered to read the depositions in a record of Charles County Court in Maryland, in a suit for freedom, by one of the same family of negroes, as hearsay in relation to the common ancestor of that family.

Mr. Key and *Mr. Caldwell*, for the petitioner, objected and cited 1 Phillips on Ev. 190.

Mr. Smith and *Mr. Swann*, *contrà*, cited 1 Phil. on Ev. 174; Wheat. Dig. 153, § 16.

The COURT (*nem. conv.*) said that the depositions could not be read in evidence, to prove the condition of the ancestor, (*Airy.*)

Verdict for the petitioner.

United States *v.* Vanzandt.

GARDNER & JOHNSON *v.* TENNISON.

Payments made to the original creditor, after notice of the assignment of the debt, cannot be given in evidence in a suit brought by the assignee in the name of the original creditor.

INDEBITATUS ASSUMPSIT, for the balance of an account for coal sold and delivered. At the foot of the account there was an order on Tennison to pay the balance (\$76,) to John O. Lay, of Richmond.

The COURT, (THRUSTON, J., absent,) on the motion of the plaintiff's counsel, instructed the jury, that if they should be satisfied by the evidence that the account was assigned by the plaintiffs to Lay, and that the defendant had notice of such assignment, his payments to the plaintiffs after such notice, could not be given in evidence in this action.

UNITED STATES *v.* NICHOLAS B. VANZANDT.

A copy of a regimental paymaster's account as settled by the accounting officers of the treasury, certified according to the Act of the 3d of March, 1817, "to provide for the prompt settlement of accounts," is competent evidence to the jury, of the balance due from the paymaster to the United States.

A copy of a paymaster's bond, certified according to the "Act to provide more effectually for the settlement of accounts between the United States and receivers of public money," is competent evidence.

If a regimental paymaster neglects or fails to make any report to the paymaster-general once in two months, showing the disposition of the funds previously transmitted, with estimates for the next payment of the regiment, and so neglects or fails for more than six months after receiving the funds, and is not recalled for such default and neglect, but additional funds are placed in his hands notwithstanding his known neglects and defaults, the sureties in his official bond are not chargeable for his failure to account for such additional funds.

DEBT upon the official bond of John Hall, a regimental paymaster. The defendant and one David Ott, were his sureties. The condition was, "that whereas the said John Hall is appointed paymaster of the Rifle Regiment in the army of the United States aforesaid; now if the said John Hall shall well and truly execute and faithfully discharge, according to law, and instructions received by him from proper authority, his duties as paymaster aforesaid, and he, his heirs, executors, or administrators, shall regularly account, when thereto required, for all moneys received by him, from time to time as paymaster aforesaid, with such person or persons as shall be duly authorized and qualified on the part of the United States for that purpose; and moreover pay into their treasury, such balance as on a final settlement of the

said John Hall's accounts, shall be found justly due from him to the said United States, then this obligation shall be null," &c.

The alleged breach of the condition of the bond was, in not paying into the treasury the sum of \$29,266.06, a balance of an account settled and certified by the accounting officers of the treasury department.

Mr. Swann, the attorney of the United States, offered in evidence, a copy of the bond, certified by the register, and authenticated under the seal of the treasury department, according to the Act of the 3d of March, 1797, [1 Stat. at Large, 512,] "to provide more effectually for the settlement of accounts between the United States and receivers of public money." And a copy of the account of the paymaster as adjusted by the accounting officers of the treasury, and certified by the second auditor, according to the Act of the 3d of March, 1817, [3 Stat. at Large, 366,] "to provide for the prompt settlement of public accounts."

Mr. Jones, for the defendant, objected to these documents thus certified, and contended, 1st. That the sureties are not bound by these treasury settlements, especially such a naked certificate of a balance of \$29,266. The Act of 3d of March, 1797, is applicable only to "receivers of public money." Such is its title, and the first section shows that it is confined to those who are entitled to commissions upon their disbursements. The second section corroborates this construction, and speaks of delinquency. This is not a suit against a delinquent. The defendant is only collaterally bound; he is not a receiver of public money, and has no knowledge of the accounts of the paymaster. The account, if evidence at all, is only evidence against the principal, not against the surety.

2d. That this is not "a transcript from the books and proceedings of the treasury." It is only the transcript of a particular act done on a particular day. It is not a transcript of the whole of the proceedings of the treasury in relation to the account of the paymaster, it is only a certificate that a balance of \$29,266 was struck on a certain day. It is an account against the late paymaster. It was made up after he was out of office, and the first item is, "to balance on settlement this day." The settlement does not appear.

Mr. Swann, contra. The same law which applies to the principal, applies to the surety. Evidence against Hall, is evidence against his sureties. The suit might have been brought against them jointly. The first section of the act applies to receivers of public money who are entitled to commissions, but the other sections are not so limited. The second section is in general terms, "in every case of delinquency," a transcript from the books of

the treasury is evidence. So by the same act, in any case, an execution may run into any State.

The COURT (MORSELL, J., *contra*,) admitted the bond and account thus certified, to be read to the jury as evidence of the amount due from Hall to the United States.

The attorney for the United States further gave in evidence, a statement of the charges against the paymaster, on the books of the paymaster-general's office, and the transmission of accounts, vouchers, and estimates by him to that office, and also gave evidence to prove that the statement was correctly made from the books of the paymaster-general, and also sundry original letters from the said Hall, to the paymaster-general; and the original entries in the books of the second auditor, showing that several settlements of his accounts were made at sundry times by the second auditor. He also gave evidence that the moneys advanced to the said Hall, were to have been disbursed by him in the western country, namely, at St. Louis, in Missouri; to all which evidence the counsel for the defendant objected that it was not competent or admissible to charge this defendant in this action.

But the COURT (MORSELL, J., *contra*,) overruled the objection, and permitted the evidence to be given to the jury.

Whereupon the counsel for the defendant prayed the Court to instruct the jury, that if from the said evidence they should believe that the said Hall had neglected and failed to make any report or reports to the paymaster-general once in two months, showing the disposition of the funds, previously transmitted, with estimates for the next payment of the regiment, and had also neglected and failed either to transmit such estimates, or to render his vouchers to the paymaster-general for settlement, more than six months after receiving funds, and was not recalled for such default and neglect; but additional funds were placed in his hands, notwithstanding his known defaults and neglects in the instances aforesaid, then the defendant in this action is not chargeable for any failure of the said Hall to account for such additional funds, so placed in his hands, after his said defaults and neglects in respect of funds previously received, were known as aforesaid.

By the 4th section of the Act of the 24th of April, 1816, c. 69, [3 Stat. at Large, 297,] "for organizing the general staff," &c., (Pamphlet, p. 72,) it is enacted, "That it shall be the duty of the regimental and battalion paymasters to pay all the regular troops; and to insure punctuality and responsibility, correct reports shall be made to the paymaster-general, once in two months, showing the disposition of the funds previously transmitted, with accurate estimates for the next payment of such regiment, garri-

son, or department, as may have been assigned to each; and whenever a paymaster shall fail to transmit such estimate, or neglect to render his vouchers to the paymaster-general for settlement of his accounts, more than six months after receiving funds, he shall be recalled, and another appointed in his place."

Mr. Jones and Mr. Key, for the defendant. The Act of Congress is peremptory, that if the paymaster fails to report for six months, he shall be recalled. If the government fails to recall him, his sureties are discharged from all further liability. The government did not rely on his bond only, but on his frequent accounting. The sureties knew this and relied upon the government's discharging its duty in removing a delinquent paymaster. It was part of their security, and entered into their contract. It stands upon the same principle as the case of a creditor giving further time to his debtor without the consent of the surety. *Nisbet v. Smith*, 2 Br. C. C. 579; *Rees v. Berrington*, 2 Ves. Jun. 540, and in *Law v. East India Company*, 4 Ves. Jun. the Master of the Rolls says, "where any act has been done by the obligee that may injure the surety, the Court is very glad to lay hold of it, in favor of the surety." So a sale at any other place than that which is required by the agreement, releases the surety. *Ludlow v. Simmon*, 2 Caines, Cases in Error, 49, 57. Equity will not bind a surety who is not bound at law. The bond is supposed to be made in reference to the Act of Congress. Neglect of a superior officer to remove a loan officer in New York, upon his default, discharged the surety. *The People v. Janson*, 7 Johns. 331.

Mr. Swann, contra. The Act of 1816, was only directory to the executive officers. It left a discretion with the President. So long as Hall continued to be paymaster *de facto*, his sureties were liable. He was constitutionally appointed by the President, who alone had the power of removal. He held his office at the will of the President, and that will could not be controlled by Congress. The President was to decide whether the paymaster had complied with the terms of the Act of Congress, or not, and to remove him, or not, at his discretion. He continues in office until removed by the President, and until so removed his sureties are liable by the express condition of their bond. The New York cases have gone further in discharging sureties than we have here or in Virginia. The case in 2 Caines, Cases in Error, was decided upon the ground that the sale was not made according to the agreement of the parties. The case of *The People v. Janson*, was decided upon the ground of fraud on the part of the supervisors, and fraudulent concealment of the default of the loan officers.

 Bank of the United States v. Kurtz.

The COURT (THRUSTON, J., doubting,) gave the instruction as prayed by the defendant's counsel, principally upon the authority of the case of *The People v. Janson*, 7 Johns. 331.

MEM. This decision was reversed by the Supreme Court of the United States, 11 Wheat. 184, upon the authority of the case of the *United States v. Kirkpatrick*, 9 Wheat. 720, which was not decided until the 17th of March, 1824, seventeen months after the decision of this Court in this case.

 WRIGHT v. WATERS, bailiff of Dermott.

Costs do not accrue, upon levying a distress for rent, unless the goods are sold.

REPLEVIN of goods distrained for rent.

Mr. Dermott, for the defendant, moved the Court to allow the constable's poundage fees for levying the distress to be taxed as costs in replevin, the defendant having obtained a verdict for the rent arrear.

Mr. Redin, contra, contended that those fees did not accrue in this action, but if they accrued at all, they accrued before the suit was commenced. But they did not accrue at all, for the Act of Maryland 1779, c. 25, gives them only in case of sale; but here the goods were replevied, and not sold.

The COURT (THRUSTON, J., absent,) said that the poundage fees had not accrued, as no sale had been made.

 BANK OF THE UNITED STATES v. KURTZ.

The plaintiff cannot be nonsuited, for not producing books and papers, upon a mere notice by the defendant to produce them at the trial. There must be a motion to the Court, for an order to produce them; and notice of such a motion; and an order of the Court; and if the motion be not made until the cause is called for trial at the last calling of the docket, the Court will continue the cause until the next term.

THE plaintiff having been served with notice to produce the plaintiff's books, the defendant's counsel moved the Court, just as the cause was called for trial, for judgment of nonsuit, under the 15th section of the Judiciary Act of 1789, [1 Stat. at Large, 73,] for not producing the books.

Mr. Lear, for the plaintiff, objected that there had been no order of the Court to produce them; nor any motion to the Court for such an order.

Mr. Key, for the defendant, contended that he was yet in time to make the motion for an order to produce the books; and that notice of the motion was not necessary as there had been a notice served on the plaintiff to produce them at the last term; he accordingly now made the motion; but it being the last time of calling the docket, and the cause being called for trial, the Court continued it to the next term.

NEGRO MATILDA v. MASON & MOORE.

In suits for freedom the Court will not question the jurors, as they are called up to be sworn, as to their prejudices or prepossessions in favor of freedom, but leave the parties to their challenges.

A person relying upon the proviso in the Virginia law in favor of persons coming to reside in Virginia, and bringing their slaves with them and taking a certain oath, must produce competent testimony to prove that the terms and conditions of the proviso had been complied with, and in the absence of all testimony, no presumption can arise from lapse of time, to supply the defect of the testimony.

THIS was a petition for freedom, founded upon an importation from Maryland to Virginia in the year 1792.

When the jury was about to be sworn, *Mr. Jones*, for the defendant, stated that it had been an old practice in this Court, in suits for freedom, to ask each juror, before he was sworn, the following questions:

1. Have you any conscientious scruple which disinclines you to find a verdict against the petitioners for freedom, and inclines you to find a verdict in their favor, even when the law and evidence, upon strict legal principles, are against them?

2. Do you consider yourself in conscience, and upon principle, bound to find a verdict in favor of the petitioner, if the evidence be doubtful?

No objection to these questions was made by the petitioner's counsel, and the Court did not, at the moment, object to them. The questions were put, and some of the jurors stated that they did not feel indifferent in such cases, and were set aside.

But the COURT, (THRUSTON, J., not giving any opinion,) having referred to the cases of *Reason v. Bridges*, in this Court at December term, 1807, (1 Cranch, C. C. 477,) and *Negro Clem Joice v. Alexander*, at December term, 1808, (1 Cranch, C. C. 528,) and *Davis v. Wood*, at December term, 1813, (not reported,) said, that this case must not be drawn into precedent, as the Court did not mean to sanction such a practice; believing that the rights of the parties are sufficiently protected by the right of peremptory challenge given by the statute, and by the common-

Negro Matilda v. Mason & Moore.

law right to challenge for cause. That the Court was not aware of any precedent for such a practice, and was not inclined now to adopt it.

Upon the trial, the facts, as stated in the bill of exceptions, appeared to be, that before December, 1792, James Craik removed into the county of Fairfax in Virginia, with intent to settle therein, and to become a citizen of Virginia, and did so settle and become a citizen of Virginia, and continued to reside therein till his death in 1814. That at the time of his removal he brought the petitioner, she then being his slave, with him into Virginia, and there held her and her children as his slaves until his death, when he bequeathed them to his widow, who in 1814 removed from Fairfax county into the county of Alexandria in this district, with her said slaves, and continued there to hold them as her slaves until her death in 1815, when she bequeathed them to the wives of the defendants Mason and Moore, who were then inhabitants of the District of Columbia.

That all the magistrates who were in commission in the county of Fairfax in the year 1792 were dead before the year 1818.

Upon which state of facts the petitioner's counsel, *Mr. Turner* and *Mr. Taney*, prayed the Court to instruct the jury, "that if the defendant wishes to avail himself of the proviso in the 5th section of the Act of 1785, c. 77, it is incumbent on him to produce competent testimony to prove that the said James Craik had complied with the terms and conditions of the said proviso; and that, in the absence of all testimony, no presumption can arise from lapse of time or other facts in the case agreed, to supply the defects of such testimony."

Mr. Turner and *Mr. Taney*, for the petitioner. This case is not subject to the ordinary rules of evidence. *Mima Queen v. Hepburn*, 7 Cranch, 298, *Mr. Justice Duvall's* opinion. No lapse of time can bar a claim for freedom. Even in ordinary cases lapse of time must be attended by corroborating circumstances. *Butler v. Craig*, 2 Har. & M'Henry, 226; 1 Phillips, 110. The burden of proof, that he had complied with the conditions of the proviso, rests on the master. *Garnet v. Sam and Phillis*, 5 Hen. & Mun. 542, 546; *Negro Rose v. Kennedy*, in this Court, July term, 1801, (1 Cranch, C. C. 29,) *Negro Jack Garretson v. Lingan*, in this Court, at April term, 1821, [*ante*, 236,] where this Court decided that no such presumption can arise from lapse of time against a slave who is incapable of asserting his right.

Mr. Jones and *Mr. Lear*, *contra*, contended that a presumption that the oath was duly taken, arises from the lapse of thirty years since the petitioner was brought from Maryland into Virginia,

and the long continued possession of the slaves by the defendants and their ancestors, without any question having been suggested as to that fact, and the death of all the magistrates of the county who could have administered the oath, of which no record, or even certificate, was required by the law. The 5th section of the act of 1785, c. 77, is a proviso that nothing in the act contained "shall be construed to extend to those who may incline to move from any of the United States, and become citizens of this, if, within sixty days after such removal he or she shall take the following oath before some justice of the peace of this Commonwealth."

The law does not require even that the oath shall be reduced to writing, and even if it were, and certified, the certificate would not be evidence, unless made so by the statute. If nothing but direct and positive testimony to the fact is sufficient evidence, and all the witnesses are dead, and the lapse of time raises no presumption, and the burden of proof is on the master, there is no security whatever for property of this description.

The law is highly penal, and every man is presumed to be innocent till the contrary is proved. The presumption is in favor of duty; the negative must be proved. 1 Phil. on Ev. 150, § 4.

The COURT (CRANCH, C. J., *contra*,) gave the instruction as prayed; but the jury found a verdict for the defendants. The Court granted a new trial without costs. The cause came on again to be tried at April term, 1823, when the same instruction was given, and the jury found a verdict for the petitioners. The defendants took a bill of exceptions, which after stating the facts, and instruction given as above, proceeds thus:

"And thereupon the defendants insisted and contended before the jury that the facts given in evidence as aforesaid, do not impose upon the defendants the necessity of proving by substantive evidence, that the said James Craik had taken the oath prescribed by the Act of the General Assembly of Virginia, passed in the year 1785, c. 77, within the time prescribed by that act; and that the jury, upon the said state of facts, ought not to find for the petitioner for the want of such substantive proofs on the part of the defendants.

2d. That the jury, under the circumstances so given in evidence, may presume that the said James Craik had taken the said oath in the prescribed time;

But the COURT, upon the motion of the petitioners, overruled all the points so insisted upon and contended for by the defendants, and stopped the defendants' counsel from proceeding to maintain the points, or any of them, so insisted upon and contended for, before the jury, by the defendants."

The Commercial and Farmers' Bank of Baltimore v. Patterson.

Upon a writ of error the judgment in this case was reversed by the Supreme Court of the United States, and a *venire facias de novo* awarded. 12 Wheat. 590.

MEMORANDUM. The case of *Abraham v. Matthews*, 6 Mun. 159, cited by Mr. Justice Johnson, in delivering the opinion of the Supreme Court, in this cause in 1827, was not brought to the notice of the court below.

THE COMMERCIAL AND FARMERS' BANK OF BALTIMORE v. THOMAS PATTERSON.

The statute book of one of the States, purporting to be published by authority of its Legislature, and deposited in the Department of State of the United States, under an Act of Congress requiring the Secretary of State to obtain copies of the laws of the several States, is admissible evidence of the laws of such States, in the courts of the District of Columbia; and it is not necessary that such statute book should be authenticated according to the provisions of the Act of Congress of the 26th of May, 1790.

According to the laws of Pennsylvania the equity follows a promissory note into the hands of an indorsee, unless dated at Philadelphia and made payable "without defalcation."

The words, "without defalcation," do not prevent the maker of a Pennsylvania note from showing fraud in the payee in obtaining the note.

In an action by the indorsee against the maker of a promissory note, the declarations of the payee, before he parted with the note, are competent evidence for the defendant; and the defendant having proved the declaration made after the date of the note and before the suit brought, the burden of proof is on the plaintiff to show that the payee had passed away the note before the declarations were made. The addition, by the plaintiffs or the payee, of the word and letters, "Washington, D. C." to the signature of the maker without his consent, and with the intent to use that word and those letters as a part of the date of the note, which was really made in Perryopolis, in Pennsylvania, with intent to make it negotiable according to the laws then in force in the District of Columbia, is a material alteration of the note, and makes it void.

ASSUMPSIT by the indorsee of the defendant's promissory note to Barnett and Cammann for \$1,000, dated November 16, 1818, payable on the 1st of June, 1819, "without defalcation." Under the signature of the defendant, the word and letters, "Washington, D. C." were written apparently by another person. The note was really made by the defendant in Perryopolis, in Pennsylvania, and was given for part of the purchase-money of a share in a certain company called "The Perryopolis Green Glass Company," under a written agreement bearing even date with the note. Upon the general issue the defendant's counsel contended for two grounds of defence.

1. That the note was given for a share in certain glass-works, upon a false and fraudulent representation by the payees of the note of the value of the profits and effects of the company.

2. That the word "Washington," and the letters "D. C." had

The Commercial and Farmers' Bank of Baltimore v. Patterson.

without the consent of the defendant, been added to his signature, with a view to make the note negotiable according to the laws in force in the District of Columbia where the defendant resided, so as to deprive him of the benefit of his defence on the ground of fraud.

Mr. Taylor and *Mr. Marbury*, for the plaintiffs, objected to the admission of evidence of fraud or want of consideration, because the note was passed to the plaintiffs before it was dishonored, and because it has the words "without defalcation."

Mr. Key, for the defendant. The words "without defalcation," mean no more than without offset. By the statute of Pennsylvania, where this note was made, the equity follows the note into the hands of the indorsee, unless the note is dated in Philadelphia, and made payable "without defalcation." *Cromwell v. Arrat*, Serg. & Rawle, 108.

Mr. Marbury, for the plaintiff, objected to the statute book of Pennsylvania, as evidence of the law of that State. Foreign laws must be proved as facts. *Church v. Hubbard*, 2 Cranch, 187. The acts of the legislatures of the several States must be authenticated in the manner provided for by the Act of Congress of the 26th of May, 1790, [1 Stat. at Large, 122.]

Mr. Key. The statute book which is offered in evidence is Smith's edition of the Laws of Pennsylvania, purporting to be published by authority of the legislature of that State, and deposited in the department of State of the United States, under the Act of Congress requiring the Secretary of State to obtain copies of the laws of the several States, accompanied by the testimony of Mr. Clarke, a lawyer of Pennsylvania, that that edition of the laws was admitted as authentic in the courts of Pennsylvania.

The COURT (*nem. con.*) permitted the law to be read to the jury from the statute book.

The COURT, also, (*nem. con.* but MORSELL, J., hesitating,) was of opinion that by the law of Pennsylvania, the equity followed the note into the hands of the indorsee, and therefore admitted evidence on the part of the defendant, tending to show a false and fraudulent representation as to the subject-matter of the contract under which the note was given. Among other evidence, the defendant offered to prove the declarations of Barnett, one of the payees of the note.

Mr. Taylor, for the plaintiff, objected to those declarations as evidence. 1st. Because Barnett himself might be examined as a witness; and 2d. Because it does not appear that Barnett was the holder of the note at the time of the supposed declarations, which fact the defendant ought to prove before the declarations could be given in evidence.

But the COURT (MORSELL, J., doubting,) said that the burden of proof was on the plaintiff to show that the note was passed away by Barnett before he made the declarations; the defendant having proved that they were made after date of the note and before suit brought by the plaintiffs. And that, as Barnett could not be compelled to testify, on account of his interest, his declarations might be given in evidence.

And the COURT (*nem. con.*) at the prayer of *Mr. Key*, for the defendant, instructed the jury, that if they should believe from the evidence, that the note was written and delivered at Perryopolis, in Pennsylvania; and that since the delivery thereof, the payees or some person acting for them, or holding the same by assignment under them added the word and letters "Washington, D. C." now appearing on the said note, with the intention of using the said words as a part of the date of the said note for the purpose of making the same negotiable according to the laws in force in the District of Columbia, then such insertion of that word and those letters amounts to an alteration of the said note in a material part thereof, and makes the said note void, and the plaintiff cannot recover upon it.

Verdict for defendant. The plaintiffs took bills of exception, but did not sue out a writ of error.

BRENT'S EXECUTORS v. ANDREW COYLE.

A motion for a new trial, or in arrest of judgment, is a waiver of the benefit of a stay of execution agreed upon by the parties.

Mr. Ashton, for the defendant, moved to quash an execution which had been issued before the expiration of the stay agreed upon by the parties.

The verdict was rendered on the 11th of April, 1822. The defendant agreed that judgment should be entered upon the verdict, and the plaintiff agreed to stay execution two months; and that if, during the two months, any case should be carried up to the Supreme Court, resting on the same point, the stay should be enlarged until the decision of such case by the Supreme Court. The defendant, however, within the two months, moved the Court for a new trial and in arrest of judgment, which motions were overruled by the Court on the 10th of June, 1822.

Within the two months, the case of *The Bank of Columbia v. Renner*, involving the same point, but not resting altogether on the same point, was taken up to the Supreme Court. The execution was issued on the 3d of September, 1822.

Lane's Administrator v. Dyer.

THE COURT (THRUSTON, J., absent,) overruled the motion, being of opinion that the defendant, by moving for a new trial, and in arrest of judgment, must be considered as having waived the benefit of the agreement to stay the execution.

THE UNION BANK OF GEORGETOWN v. JOHN GOZLER.

It is not usury in a bank to take the discount for sixty-four days, upon a sixty-day note.

ASSUMPSIT upon the joint and several note of the defendant and two others, with a memorandum to credit the first drawer, who was Vincent King. The defence was usury in taking sixty-four days' discount upon a sixty-day note.

Mr. Jones, for the defendant.

Mr. Key, for the plaintiff.

THE COURT (THRUSTON, J., absent,) decided without argument, that it was not usury to take by way of discount, interest for sixty-four days on the amount of the note; the point having been before decided both here and in Alexandria. See *Bank of Alexandria v. Mandeville*, at Alexandria, July, 1809, [1 Cranch, C. C. 552;] *Bank of Washington v. Eliot*, (not reported.)

EMMERSON v. BEALE.

Costs must share the fate of the principal debt.

A debtor whose person is discharged under the Insolvent Act of the District of Columbia, as to the debt, is not liable to a *ca. sa.* for costs, on a judgment for costs, confessed after his discharge in an action pending at the time of his discharge.

MOTION to quash a *ca. sa.* issued against the defendant for costs on a judgment confessed for costs, after his discharge under the Insolvent Act of this district, in an action pending at the time of his discharge.

THE COURT (*nem. con.*) said that the costs must share the fate of the principal debt; and ordered the *ca. sa.* to be quashed.

LANE'S ADMINISTRATOR v. DYER.

A bond to convey land is a good consideration for a promissory note for the purchase-money, although the payee of the note, who had given the bond of conveyance, had not the legal title and could not convey it when the note became payable. The in-

Goulding v. Fenwick.

indorsee of the note who has the legal title to the land and the power to convey it, may sustain an action against the maker, without tendering a title.

THIS was an action by the administrator of the indorsee of the defendant's promissory note, payable to the order of Richard Forrest and Richard Cutts, and by them indorsed to the plaintiff's intestate.

The note was given for part of the purchase-money of a city lot to which the payees Forrest and Cutts had no title at law, but had given their bond to convey it to the defendant upon his payment of the purchase-money. It was agreed that Lane, the indorsee, knew that the note was given for the purchase of that lot, and, being the city commissioner, had power to convey it; the title being in the United States; and would have conveyed it if the purchase-money had been paid.

Mr. Ashton, for the defendant, contended that the note was void for want of consideration, as the payees had no title, and cited *Chitty*, 92, 93; *Moggridge v. Jones*, 14 East, 486; S. C. 3 Camp. 38; *Basten v. Butler*, 7 East, 479, 487; *Duncan v. Scott*, 1 Camp. 100.

Mr. Forrest and Mr. Jones, contra. The bond of conveyance was a sufficient consideration; and the plaintiff's intestate had power to convey and would have conveyed the legal title upon payment of the money.

The COURT (THRUSTON, J., absent,) said that the bond was a good consideration for the note, and that as the defendant had never tendered the money and demanded a title, there was no failure of consideration.

Verdict for plaintiff.

GOULDING v. FENWICK.

This Court has no jurisdiction to quash a *fiery facias*, issued by order of a justice of the peace, from the office of the clerk of this Court, under the 4th section of the Act of Congress of the 3d of May, 1802, and the 15th section of the Act of 24th June, 1812; nor to render judgment of condemnation of the rights and credits returned upon such *fiery facias* as levied upon by the constable in the hands of a third person.

The law has provided no means to compel the garnishee to pay the money in his hands.

A *fiery facias* against the rights and credits only of the defendant, was issued from the office of the clerk of this court, by order of the justice of the peace who rendered the judgment, and was returnable to the same office on the 1st Monday of October, 1822. This *fiery facias* was issued under the 4th section of the Act of Congress of the 3d of May, 1802, [2 Stat. at Large, 193,]

and the 15th section of the Act of the 24th of June, 1812, [2 Stat. at Large, 755.]

By the 4th section of the Act of 1802, it is enacted that no *ca. sa.* shall issue on any judgment in any case where the judgment, exclusive of costs, shall not exceed twenty dollars; "but that in such cases execution shall be only on the goods and chattels of the debtor, and shall issue, by order of the justice who may have taken cognizance of the action from the clerk's office, and shall be returnable thereto, and that all such executions be returnable on the first Monday of every month."

By the 15th section of the Act of 1812, it is enacted, "that upon a *feri facias* issuing out of the office of the clerk of the county of Washington, upon the judgment of a magistrate, the plaintiff, upon such *feri facias*, shall be entitled to have his execution against the goods and chattels, lands and tenements, rights and credits of the defendant." The constable returned on the execution, that he had "levied on the rights and credits of John Fenwick, in the hands of Matthew Wright, and served a notice of the same, in writing, on the said Wright, notifying him to retain the sum of \$20.49, it being the amount of the debt, interest, and costs."

Mr. Key, for the plaintiff, moved for a rule on the defendant and garnishee, to show cause why the Court should not render judgment of condemnation of the rights and credits of Fenwick, in the hands of Wright.

Mr. Marbury, at the same time, moved the Court to quash the execution.

The COURT, (THRUSTON, J., absent,) overruled both motions, being of opinion that this Court has no jurisdiction in the cause; and that the law has provided no means of compelling the garnishee to pay the money.

The Court said that, perhaps, if the garnishee upon such notice, should voluntarily pay, he might plead such attachment and payment against his creditor, but upon this point they did not mean to give an opinion.

OTT'S ADMINISTRATORS v. JONES.

If there are several actions against the maker and indorser of a promissory note, and judgment for the debt and costs be rendered against the maker, who pays the same, the indorser will not be permitted to give evidence of such payment by the maker, until the costs be paid in the action against the indorser.

ASSUMPSIT against the indorser of a promissory note. Judgment had been rendered against the maker, who paid it, with costs.

Hogan v. Ingle.

Mr. Lear, for the defendant, contended that the plaintiff could not recover costs in this case ; but

The COURT refused to permit the defendant to give evidence of payment since the suit was brought, until the costs should be paid in the present case.

The defendant then confessed judgment for costs.

THADY HOGAN v. JOSEPH INGLE.

Distress for taxes due to the Corporation of Washington, is not barred by the Statute of Limitations.

REPLEVIN for goods taken by the defendant as a distress for taxes due to the Corporation of Washington for the years 1812, 1813, 1814, 1817, and 1818, amounting to \$55.53. The distress was laid November 3d, 1820. The plaintiff tendered \$19.37, the amount of taxes due for the years 1817 and 1818, and on the 7th of November, 1820, replevied the goods, having first obtained an order or warrant therefor in these words :—

“ To the clerk of the Circuit Court of the District of Columbia, for the County of Washington : Whereas, Thady Hogan, of the county aforesaid, bricklayer, has satisfied me, the undersigned justice of the peace for the county aforesaid, that it is necessary for the purposes of justice that a replevin should issue in the name of the said Thady Hogan, as plaintiff, against Joseph Ingle, collector of taxes, due the Corporation of Washington, in the second ward, for the following personal property taken in execution by the said collector for arrearages of taxes due to the said corporation ; that is to say, one mahogany bureau, &c. Now, therefore, you are by these presents empowered and directed forthwith to issue a writ of replevin for the goods and chattels taken as aforesaid ; provided, however, that the said plaintiff shall lodge with you, before the issuing of such writ, the sum of \$19.37, which appears to be the sum really due from him for taxes ; and for so doing, this shall be your sufficient warrant. Given under my hand and seal, this 4th day of November, 1820. Joseph Forrest. [L. s.]”

The Maryland Act of 1785, c. 34, enacts, “ that in every case of money or other thing, due the public, for satisfaction of which there shall be any distress or execution of property by any officer or person authorized by law so to do, no writ of replevin shall issue, or be maintainable in law.”

By the Act of 1786, c. 12, on a distress, the party may complain to the commissioners of the tax, who may hear and adjust such complaint, and suspend the sale of the property ; and

By the Act of 1790, c. 53, where personal property shall be taken in execution for public taxes by collectors of arrearages, the party may obtain a writ of replevin by satisfying a justice of the peace that it is necessary for purposes of justice that a replevin should issue, who will thereupon issue his warrant to the clerk, &c. Under these acts, the warrant in the present case was granted, and the writ of replevin issued.

The defendant justified the taking of the goods as a distress for the taxes of which he was collector.

The plaintiff relied on the plea of limitations, and at the trial of this cause at the last term,

The COURT (THRUSTON, J., *contrà*,) was of opinion, that the statute of limitations was a bar.

The verdict being for the plaintiff, the defendant moved the Court for a new trial, upon the ground of misdirection of the jury upon that point, which motion now came on to be argued.

Mr. Key, for the defendant. The question is, can the plaintiff in replevin reply the statute of limitations to an avowry for taxes due to the Corporation of Washington. The Maryland statute of 1715, c. 23, limits "all actions of debt for lending, or contract without specialty, and all actions of debt for arrearages of rent," but says nothing of distress, nor of any other kind of debt. It speaks only of actions. A distress is not an action. It is execution. The statute of limitations is in derogation of the common law, and must be construed strictly. An action of debt for escape is not within the statute; nor an action of debt on the 2 Eliz. 6, for not setting out tithes; nor for arrearages of rent, reserved on a lease by indenture; nor for money levied on a *fiery facias*; nor on a tally; nor on an award; nor any uncommon action of debt, or of detinue. Bac. Ab. tit. Limitation, D; *Jones v. Pope*, 1 Saund. 37. No case has been found, in which it has been decided that a distress for rent was within the statute, although an action of debt for rent is.

Mr. Jones, contrà. If the remedy be extinguished, the legal right is extinguished, although the moral obligation may remain. A debt is as much discharged by the statute of limitations, as by a discharge under a bankrupt law. *Trueman v. Fenton*, Cowp. 548; *Hawkes v. Saunders*, 1b. 290; *Barnes v. Hadley*, 2 Taunt. 184; *Hardy v. Cathcart*, 5 1b. 14, 56. "Any construction of the statute to make it bar one form of suing, while others are open, was nugatory and contrary to its true intent." "The law, from the nature of it, ought to be taken liberally in favor of defendants." "The limitation of suits is founded in public convenience, and attended with so much utility, that Courts of Equity adopt this statute as a positive rule, and apply it by parity of reason,

Hogan v. Ingle.

to cases not within it ;" per Lord Mansfield, in the case of *Johnson et al. v. Smith*, 2 Burr. 961.

There is a great difference between the English and the Maryland statute of limitations. The English statute enumerates the forms of action technically. The Maryland statute uses words of general and common import. It refers to the cause of action, rather than to the form of action. It speaks of actions founded on book-debt, and on account. It includes all actions of debt not founded on specialty. Thus, an action of debt *qui tam* is within the statute. There are many cases within the reason of the statute, though not within the letter, and where the party may avail himself of it, with or without special plea.

It is said that a distress is an execution, not an action, and therefore not within the statute. But an avowant is an actor. His avowry is the declaration in an action commenced by the distress. The plaintiff pleads to it, an issue is joined, and the cause proceeds to trial and judgment. The statute is a bar to all actions upon contract, and all actions of debt not on specialty. If an action of debt had been brought for these taxes, it would have been within the statute; and if one remedy is barred, all remedies for the same cause of action are barred also. Under the charter of the Bank of Columbia, the first process is an execution, and the goods may be sold before the defendant can have any remedy. On the return of the execution, he may have an issue tried, whether the debt be due, and may plead the statute of limitations in the same manner as if the bank had brought suit in common form. So the statute is a bar to a libel for seamen's wages, as if the suit were at common law; and so in all cases when the courts of admiralty and courts of common law have concurrent jurisdiction. *Ballatyne on Limitations*, 94; *Hide v. Partridge*, 3 Salk. 228.

The taxes due to the Corporation of Washington, are only debts, and are not entitled to greater privileges than debts due to banks and other corporations, or even to individuals. They are called taxes, but they are not taxes due to the sovereign authority of the country. They are entitled to no prerogative protection, no priority of payment, and no extraordinary mode of collection. They do not form an exception to the general principle, that if the right be barred in one form of action, it cannot be recovered in another. No presumption of purity in the corporation can give any sanctity to its claims. They are as much within the spirit of the law, as the claims of individuals.

But it is said that this is a debt due by statute, and therefore not within the limitation, like the action of debt for an escape. But there were other reasons for that decision. The cause of action for escape arises *ex maléficio*, and was therefore not one of

Hogan v. Ingle.

the forms of action barred by the statute. It was not an action of debt upon the statute, although the statute gave the remedy. So the remedy upon a promissory note is given by the statute of Anne, yet the action is not upon the statute. So the action for use and occupation is given by a statute, but is barred by the limitation. So the charter of Washington gives the corporation power to lay and collect taxes, (among many other powers,) and to contract, and to become creditor and debtor, but that does not exempt all their contracts from the act of limitation.

Mr. Key, in explanation. The tax is imposed by a by-law, which, being authorized by the charter, is equivalent to a specialty of the highest nature.

Mr. Jones, in continuation.

The obligation to pay the tax arises from the joint act of the corporation and the party. He makes himself debtor by purchasing or holding property in the city. It is a contract. A corporation aggregate is only a collection of individuals, and has no other privileges than those expressly given by its charter.

Mr. Swann, in reply. This is a claim for taxes due to a corporation empowered by Congress to lay and collect them. It is a debt, not by simple contract, but by record or by specialty, or by an act in the nature of a specialty, and therefore is not within the statute of limitations. It is like the case of taxes in Maryland. By the common law, replevin does not lie for distress for taxes. To lay and collect taxes is a sovereign prerogative; and so far as that power is delegated to the Corporation of Washington, it is a sovereign, and is entitled to the benefit of the maxim, *nullum tempus occurrit regi*. When Congress delegated this power to the Corporation, it meant to give with it all the collateral powers and rights belonging to a state in relation to taxes. The plaintiff has considered these taxes as public dues, or he would not have applied to a justice of the peace for a warrant to the clerk to issue the replevin, under the Act of 1790, ch. 53.

The statute of limitations is to be construed strictly as to the classes of actions to be barred, but liberally as to the individual cases in the several classes. If distress for taxes be within the statute, what is the period of limitation? One, two, or three years, or any other time? The remedy is expressly given by Act of Congress, and if it be an action, it is an action upon the statute. No case can be found of a plea of limitation to an avowry for rent. Distress and sale is an execution. No day is given to plead the act of limitations.

The COURT (*nem. con.*) granted a new trial without costs, being of opinion that the statute of limitations was not a bar to distress for taxes due to the Corporation of Washington.

Boothe v. The Corporation of Georgetown.

BOOTHE v. THE CORPORATION OF GEORGETOWN.

A warrant for the violation of a by-law should specify the by-law and the manner of violating it.

So should the judgment.

No appeal lies to this Court from the judgment of a justice of the peace for the penalty for violating a by-law of Georgetown.

THIS was an appeal from the judgment of the mayor of Georgetown, who has, by charter, the powers of a justice of the peace, upon four warrants for the violation of an ordinance or by-law of the Corporation of Georgetown respecting taverns. Neither the warrant nor the judgment specified the by-law, nor the nature of the violation of it by the defendant. The judgment was simply for ten dollars upon each warrant.

The COURT (THRUSTON, J., absent,) was of opinion, that the warrants were too vague, and were not aided by the judgment.

But *Mr. Dunlop*, for the appellee, contended that this Court has no appellate jurisdiction in cases of violation of the by-laws of Georgetown.

This Court has no appellate jurisdiction of a judgment of a justice of the peace, except by analogy to the appellate jurisdiction given to the county courts in Maryland by the Act of 1791, c. 68, which is only in cases of contract. The Act of Congress of the 27th of February, 1801, [2 Stat. at Large, 103,] "concerning the District of Columbia," declares that the laws of Maryland as they then existed should continue in force in this part of the district; and that the justices of the peace here should have all the powers vested in justices of the peace, as individual magistrates, by the laws of Maryland, and should have cognizance in personal demands to the value of \$20.

If the Act of Maryland of 1791, c. 68, for the recovery of small debts, gives to the justice of the peace in Maryland, a jurisdiction subject to appeal and revision in a higher court, and if there should be no appeal here from the judgment of the justice, the law of Maryland upon that subject would not be continued here. It would be a different law. It would give a justice of the peace here an absolute and conclusive jurisdiction, when in Maryland he had a jurisdiction subject to revision. His judgment would be conclusive here; but in Maryland it would be only *nisi*; that is, unless reversed upon appeal.

It was upon that ground that this Court first entertained an appellate jurisdiction over the judgments of the justices of the peace as individual magistrates in civil causes; and it is apparent that its appellate jurisdiction could not extend beyond the original

Boothe v. The Corporation of Georgetown.

jurisdiction there given to the justices of the peace in Maryland by the Act of 1791, c. 68, which, by the 10th section, is expressly confined to cases of contract. If a new jurisdiction is given to a justice of the peace, of cases not within the Maryland statute, this Court has no appellate jurisdiction in those cases, unless it be expressly given by some statute. In Georgetown, the justice of the peace takes cognizance of violations of the by-laws, under the by-laws themselves, and not under the law of Maryland or any act of Congress. In the charter of Washington of 1802, § 7, [2 Stat. at Large, 197,] it was expressly provided, that "all the fines, penalties, and forfeitures imposed by the Corporation of the city of Washington, if not exceeding \$20, shall be recovered before a single magistrate, as small debts are by law recoverable." The 7th section of the amended charter of the 4th of May, 1812, [2 Stat. at Large, 726,] recognizes the jurisdiction of the justices of the peace for the recovery of fines and penalties incurred by breach of the by-laws of the Corporation; and by the 9th section of the new Washington charter of 1820, [3 Stat. at Large, 588,] it is provided that "in all cases where suit shall be brought, before a justice of the peace, for the recovery of any fine or penalty arising or incurred for a breach of any law or ordinance of the Corporation, execution shall and may be issued, as in other cases of small debts." Fines and penalties under the by-laws of the Corporation of Washington, being thus put upon the same ground as small debts, which by the law of Maryland were to be recovered before a justice of the peace, it was right in this Court to entertain appellate jurisdiction equally in both classes of cases. But there are no such provisions in the charter of Georgetown, in regard to the by-laws or ordinances of that corporation, nor in any act of Congress respecting the same, which can give this Court any such appellate jurisdiction in cases of violation of those by-laws or ordinances.

Mr. Taney, contra. The fines and penalties under these by-laws are debts; and if under \$20 are small debts. Every corporator binds himself to obey the by-laws; and if he violates them, he violates his contract. If a by-law can give jurisdiction to a justice of the peace, he may decide causes to an unlimited amount. The right of appeal is coextensive with the jurisdiction of the justice. The Act of Congress of the 27th February, 1801, § 11, [2 Stat. at Large, 103,] only authorizes the justices of the peace to exercise the same jurisdiction which they exercised in Maryland. The Corporation of Georgetown could not extend that jurisdiction; nor could they erect a judicial tribunal to take cognizance of their by-laws.

The Court (upon consideration,) ordered the appeal to be dismissed.

UNITED STATES, at the relation of R. C. Weightman, v. THOMAS CARBERY, Mayor of Washington; and the Commissioners of Election.

The election of a Mayor of the city of Washington must be held in each ward by three Commissioners of Election. If the three are present the acts of the majority are, in law, the acts of the three. The return of two is sufficient, if the three were present. The return of the commissioners is not conclusive, but is *prima facie* evidence that the votes were good, and throws the burden of proof on the relator to show that bad votes were given for the incumbent. If the election be held by two commissioners only, in any of the wards, the whole election is void.

A certificate of the result of the election must be returned by the commissioners to the boards of aldermen and common council. Parol evidence is competent to show that all the commissioners were present.

A writ of *mandamus nisi*, was obtained by Mr. Roger C. Weightman, one of the candidates for the office of mayor of Washington at the late election, held on the first Monday in June, 1822, against Mr. Thomas Carbery, who had been returned as duly elected; and against the commissioners of election; commanding the said Thomas Carbery immediately to cease and forbear to hold, claim, or execute, the place, or office of mayor, and to admit the said Roger C. Weightman into the said place and office; and commanding the said commissioners to return him as mayor of the said city duly elected at the said election, or show cause to the contrary. To this writ there was a special return, concluding with an averment that the said Thomas Carbery was duly elected mayor, &c., and that the said R. C. Weightman was not.

Upon this traverse, an issue was joined; which came on to be tried on the 2d of January, 1823.

Mr. Jones, for the relator, contended, 1st, that the return of the election of mayor must, under the 3d section of the charter of 1820, [3 Stat. at Large, 583,] be made by all the commissioners of election. A return by part of them is insufficient. It is different in the case of the election of members of the boards of aldermen and common council; for by the 6th section the return by a majority, as to their election, is expressly authorized. 2d. That the election must be holden by three commissioners in each ward; although a return by two should be deemed sufficient. All must be present acting, or ready to act; and this must appear by their return. Parol evidence is not competent to prove that fact. The return of the first ward is by two of the commissioners only; and they do not certify, that they are a majority. If one of the commissioners is present and refuses to act, there are in law only two present. The reason for having three present, is, that all questions may be promptly decided. The general principle that in

United States v. Carbery.

corporations aggregate, the act of a majority is the act of all, does not apply to the commissioners of election. They have only a joint power.

Mr. Swann and *Mr. Ashton*, for the respondents. The return by a majority is sufficient; and it is competent to show by parol evidence that all the commissioners were present, and that those who made the return were a majority. In all cases of a public nature, and where the power is given for the public good, the act of the majority is the act of all. *Green v. Millaud*, 6 Johns. 39, 41; *Grindley et al. v. Barker*, 1 Bos. & Pul. 229; *The King v. Beetson*, 3 T. R. 592; *Withnall v. Gartham*, 6 T. R. 388; Vin. Ab. tit. Authority, p. 418, § 6; Co. Lit. 181, (b.) Suppose one of the commissioners should be taken suddenly ill, or should die, or seeing that the election was going against his wishes, should retire, or refuse to act — would the whole election be void? This surely could not be the intention of the Legislature. In the case of corporations aggregate, it is not necessary that all should be present, if all had notice.

The COURT (*THRUSTON, J.*, absent,) decided,

1st. That it was competent to give parol evidence to show that the whole number of commissioners were present at the election in the first ward.

2d. That the election in each ward must be holden by three commissioners.

3d. That if the three commissioners were present, the acts of the majority were in law the acts of the three.

4th. That the return of two is sufficient if the three were present.

Mr. Jones and *Mr. Key*, for the relator, then offered evidence to show that votes had been given, for Mr. Carbery, by unqualified voters.

Mr. Swann and *Mr. Ashton* objected, and contended that the several returns of the ward commissioners is conclusive on that point, they being the sole judges of the qualifications of the electors; and as the choice is required to be by ballot, no voter can be compelled to disclose for whom he voted. No power is given, by the charter, to any person or tribunal to decide upon the election of mayor. The boards of aldermen and common council have the sole and exclusive right, by the 6th section of the charter, to "judge of the legality of the elections, returns, and qualifications of their own members," but not of the mayor. By the 3d section the commissioners are to certify to the boards of aldermen and common council "the result of the election of mayor;" in order to do which, they must decide upon the qualification of the voters at the time of voting. It is not necessary

that the certificate of the election of the mayor should be the joint act of all the eighteen commissioners of election. If each set of commissioners of the several wards, respectively certify the number of votes taken in their respective wards, it is equivalent to a certificate of the result of the election by the eighteen commissioners ; for if the number of votes in each ward is ascertained, the result of the election is that he is chosen who has the greatest number of votes. It is not necessary that the result should be certified by the commissioners where they have certified the facts from which that result must necessarily follow. The return of the commissioners as to the election of mayor is to be made in the same manner as that for the election of the members of the boards of aldermen and common council ; that is, "the commissioners for each ward, or a majority of them, shall count the ballots, and make out, under their hands and seals, a correct return of the persons having the greatest number of legal votes," "together with the number of votes given to each person voted for." In order to do this they must necessarily decide upon the legality of the votes. This Court has no jurisdiction to decide upon the validity of the election.

Mr. Jones. The jurisdiction of this Court is general, and is unlimited by the subject-matter. It has an inherent jurisdiction to compel all the corporations in the district to do their duty. In this respect there is no difference between the Corporation of Washington and the banks and insurance companies. This Court has compelled the Bank of Alexandria to open its subscription ; has set aside the election of the officers of the Union Bank of Alexandria, and of the Columbian Insurance Company.

The commissioners have no authority to judge of the qualification of the electors. By the 5th section of the charter, the register of the city is to furnish the commissioners with "a list of the persons having a right to vote." The register, therefore, and not the commissioners, is to judge of the qualifications of the voters. The boards of aldermen and common council have the exclusive right of judging of the election of members of their own bodies, and consequently of the qualifications of the electors ; and the mayor is to be chosen by the same electors. No power is anywhere given to the commissioners upon that subject. They are to receive the votes of such voters as are on the register's list.

Mr. Key, on the same side, cited *Johnston v. Corporation of Charleston*, 1 Bay, 441 ; *Brosius v. Renter*, 1 Har. and Johnson, 557, 558.

Mr. Swann, contra, cited *Symmers v. Regem*, Cowp. 498.

The COURT (THRUSTON, J., absent,) said that the return of the

Bank of the Metropolis v. Walker.

commissioners was not conclusive, but was *primâ facie* evidence that the votes were good, and threw the burden of proof on the relator to show that bad votes were given for the incumbent.

The Court, also decided that the return from the 5th ward was void because the election was holden by two only of the three commissioners; and that the whole election was void for that reason; as well as because no certificate of "the result of the election of Mayor" was ever returned by the commissioners to the board of aldermen and board of common council, agreeably to the 3d section of the charter.

Notwithstanding this opinion of the Court the jury found a general verdict "for the defendants," thereby, in effect, affirming the election to be valid.

The COURT (THRUSTON, J., absent,) ordered a new trial to be had at the present term, without costs. The issues were informal, there being a double traverse, namely, the election of Mr. Weightman traversed by Mr. Carbery; and that of Mr. Carbery by Mr. Weightman.

The new trial came on, January 8, 1823, when *Mr. Swann*. to show that upon a *mandamus* the defendant cannot be amoved unless for the purpose of admitting the relator, cited *The King v. The Mayor of Colchester*, 2 T. R. 259; *The King v. The Bishop of Chester*, 1 T. R. 396; *Geter v. Commissioners for Tobacco Inspection*, 1 Bay, 356.

The COURT gave the same instructions to the jury as upon the former trial; and added, further, that upon the evidence, the jury ought to find a verdict for the relator.

Mr. Swann, prayed the Court to instruct the jury that it was competent for them, upon that evidence, to find a verdict for the defendant; but the Court refused.

Verdict for the relator; who thereupon filed an information in the nature of a *quo warranto*, in the name of the Attorney of the United States, but it was never prosecuted, as the term for which the mayor was elected expired on the first Monday of June, 1824, and it could hardly be expected that the proceedings upon the *quo warranto* would be terminated before that day.

BANK OF THE METROPOLIS v. JOSEPH WALKER.

A judgment upon a special verdict, or upon a verdict subject to the opinion of the Court upon a case stated, does not relate back to the date of the verdict so as to overreach an intermediate judgment against the same defendant in another cause.

The plaintiffs (the Bank of the Metropolis) obtained a verdict

Bank of the Metropolis v. Walker.

against the defendant at October term, 1821, subject to the opinion of the Court upon a case stated. Before any argument upon the points reserved the cause was continued to April term, 1822, and argued on the 2d of May, and also on a subsequent day.

The Court, on the 7th of June, 1822, rendered judgment for the plaintiff upon the case stated.

In the intermediate time, viz. on the 24th of April, 1822, King and Langley recovered a judgment against the same defendant (Joseph Walker) and the marshal levied the *feri facias* upon the defendant's land, and made the money.

The Bank of the Metropolis obtained a rule upon the marshal to show cause why he should not pay over to that bank the money which he had thus made out of the defendant's real estate upon the *feri facias* in favor of King and Langley, upon the ground that the judgment, in favor of the bank upon the case stated, related back to the time of the finding of the verdict at October term, 1821, and overreached the judgment in favor of King and Langley, rendered on the 24th of April, 1822.

In support of this idea, *Mr. Ashton*, for the bank, cited the case of *Perry v. Wilson*, 7 Mass. Rep. 395, where a case was ordered by the court to stand over for advisement and the defendant died. The court said that they would take care that the plaintiff should not suffer by the delay of the court, and ordered the judgment to be entered as of the preceding term.

Mr. Morfit, contra, cited *Taylor v. Harris*, 3 Bos. & Pul. 549, and *Welsh v. Murray*, 4 Dal. 320.

The Court discharged the rule, being of opinion that the judgment did not relate back to the verdict; no argument having been had upon the case stated, nor had it been submitted to the Court before the cause was continued, by consent, from October term, 1821, to April term, 1822. It was not continued under *cur. ad. vult.*

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1822, AT ALEXANDRIA.

OFFUT'S EXECUTOR *v.* HALL'S ADMINISTRATOR.

Where an administrator is defendant, the Court sitting in Alexandria will permit him to plead the statute of limitations at the trial term; to which plea the plaintiff cannot make more than one replication.

AT May term, 1821, the jury, in this cause not being able to agree, a juror was withdrawn; after which, upon the defendant's motion, the Court permitted him to plead the statute of limitations.

Mr. Taylor, for the defendant.

Mr. Mason, for the plaintiff.

At the present term, *Mr. Mason*, for the plaintiff, offered several replications to the plea of limitations, supposing he had a right so to do, under the equity of the statute of Virginia, of the 12th of December, 1792, § 40, by which it is enacted that "the plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law or fact, as he shall think necessary for his defence."

But the COURT (THRUSTON, J., absent,) said he must confine himself to one replication, which must not be double.

THE COMMON COUNCIL OF ALEXANDRIA *v.* CORSE.

The surety in an official bond, conditioned that the principal shall faithfully execute the duties of his office, is not liable for the honest error in judgment or want of skill, of the principal. But gross negligence is want of fidelity.

DEBT, against the surety of one Talbot, an inspector of fish, upon his official bond faithfully to execute the duties of the office.

Mr. Mason, for the defendant, prayed the Court to instruct the jury, that the defendant was not liable upon this bond, for honest error in judgment, or want of skill; and cited 10 Johns. 271.

Ex parte Hadry.

THE COURT, (THRUSTON, J., absent,) at the prayer of the defendant's counsel, instructed the jury, that the defendant was only liable for the faithful discharge of Talbot's duty as inspector, and was not liable for his honest error in judgment, or want of skill.

But the Court, at the prayer of the plaintiff's counsel, further instructed the jury, that if the inspector was guilty of gross negligence in examining the fish, he did not faithfully execute the duties of his office in that respect.

UNITED STATES *v.* ELIZA RIGSBY.

In larceny, "one silver coin of the value of fifty cents," is a sufficient description of the property stolen.

THE defendant was convicted of larceny.

Mr. Hewitt, for the defendant, moved in arrest of judgment, that "one silver coin of the value of fifty cents of the goods and chattels of one John Kinchelow," is too vague and uncertain a description of the property stolen. It does not state the value in the current money of the United States, or of any other country.

THE COURT, (THRUSTON, J., absent,) after looking into precedents, overruled the motion.

Ex parte HENRY HADRY, an Insolvent Debtor.

UPON the trial of an issue upon allegations filed by the creditors of an insolvent debtor to prevent his discharge, he must produce his books of account, if called for.

UPON the application of Henry Hadry to CRANCH, C. J., for a discharge under the act for the relief of insolvent debtors within the District of Columbia, he appointed the 2d Monday of November, for that purpose, when the Court was in session.

Mr. A. C. Cazenove, one of his creditors, filed allegations of fraud, and petitioned the Court for a jury, which was ordered accordingly.

On the trial of the issue upon his allegations, the counsel of *Mr. Cazenove* called upon the petitioner to produce his books of account. The petitioner stated that he had them ready to produce, if the Court should order him to produce them, but he did not mean voluntarily to produce them, to gratify his creditors.

Hutchinson, Traverse, & Co. v. Peyton.

The COURT (THRUSTON, J., absent,) ordered the books to be produced; and observed that the petitioner when he makes application to the judge, must offer to surrender all his property, effects and evidences of debts, and is presumed to have them ready to be produced, and before his discharge must deliver them to the trustee. Allegations of fraud may as well be filed after his discharge as before; and if filed after, the books would be evidence.

HUTCHINSON, TRAVERSE, & CO. v. PEYTON and others.

If an agreement in writing be made by one of the partners of a mercantile firm, it is competent for the plaintiffs, in an action in the name of the members of the firm, to prove, by parol, that it was made by that partner as the agent, and for the use and benefit of the firm.

The fact that insurance was made, cannot be proved without producing the policy, or showing it to be lost.

An agreement in writing, respecting the advance of bills on London to the amount of £4,000 sterling, and the consignment of a cargo of flour to John Traverse, one of the plaintiffs, in Lisbon, was made between the defendants and the said Traverse. In an action by the firm, their counsel offered parol evidence to prove that the agreement, although in the name of Traverse alone, was made by him as the agent and for the use and benefit of the firm.

Mr. Swann and *Mr. Hewitt*, for the defendants, objected that it was not competent evidence, because it contradicts the written papers in which the name of the firm is not mentioned.

But the COURT (THRUSTON, J., absent,) overruled the objection and admitted the evidence.

The plaintiffs, to support a charge for the premium of insurance, gave in evidence the defendants' orders to Traverse to cause insurance to be made, and the deposition of a witness stating positively that insurance was made by Baring & Co. in London; and the acknowledgment of Peyton, one of the defendants, that the premium was reasonable.

But the COURT (THRUSTON, J., absent, and CRANCH, C. J., doubting,) said that it was necessary to produce the policy, or to show it to be lost.

The plaintiffs became *nonsuit* with leave to move to reinstate the cause, on the ground of misdirection to the jury by the Court. But it was not moved again.

UNITED STATES v. CAMILLUS GRIFFITH.

A contractor's account, adjusted by the proper accounting officers of the treasury, and certified and authenticated according to the 11th section of the Act of the 3d of March, 1817, c. 45, is evidence not only of money advanced to the contractor, but of money disbursed by officers of the army for provisions, in consequence of the contractor's failure to comply with his contract.

The third auditor is not authorized to authenticate copies of bonds and other papers. His power under the Act of the 3d of March, 1817, extends only to "transcripts from the books and proceedings of the treasury in regard to the accounts of the war department."

Copies of bonds must still be certified by the register, and authenticated under the seal of the department, under the Act of the 3d of March, 1797.

DEBT for \$60,000, the penalty of the defendant's bond to the United States, conditioned to perform the covenants of an agreement between him and the acting Secretary of War, dated November 5, 1817, for the supply of rations to the troops of the United States in certain places; by the 5th article of which, the commanding general or person appointed by him, at each post or place, in case of absolute failure or deficiency in the quantity of provisions contracted to be delivered and issued, has power to supply the deficiency, by purchase, at the risk and on account of the defendant, and by the 10th article, all advances of money to the defendant on account of supplies, &c., and all such sums of money as the commanding officer, &c., may cause to be disbursed in order to procure supplies in consequence of any failure on the part of the defendant in complying with the requisitions therein contained, shall be duly accounted for by him by way of set-off against the amount of such supplies, and the surplus, if any, repaid to the United States, immediately after the expiration of the term of that contract, with interest. The breach assigned was, that the defendant had not accounted for \$120,000 advanced to him for such supplies, and \$50,000 disbursed by the commanding officers in order to procure supplies in consequence of the defendant's failure to comply with the requisitions of the contract. In order to support the issue on the part of the United States,

Mr. Swann, the district attorney, offered in evidence an account between the United States and the defendant, adjusted by the proper accounting officers of the treasury, who reported a balance due to the United States, amounting to \$89,778.41, including \$47,334.81, for amount of payments made by sundry officers for the purchase of provisions in consequence of the defendant's having failed to make the necessary supplies according to his contract.

Mr. Taylor, for the defendant, objected that these items of disbursement by the officers, were not sufficiently proved by the

Maul v. Scott.

account settled at the war department. That the account is not evidence of those items, but only of the moneys advanced to the defendant by the United States.

The COURT stopped Mr. Taylor, and said that the point had been decided by this Court at the last term in Washington, (see *United States v. Vanzandt*, ante, 338,) to wit, that the account settled at the treasury was evidence; and that the defendant could not give evidence of claims which had not been presented to the proper officer of the treasury for settlement, and disallowed.

The COURT (THRUSTON, J., absent,) at May term, 1822, decided that the third auditor could not authenticate a copy of the bond; his power of authentication, under the Act of the 3d of March, 1817, [3 Stat. at Large, 366,] extending only to "transcripts from the books and proceedings of the treasury in regard to the accounts of the war department," and that copies of bond must still be certified by the register, and authenticated under the seal of the department, according to the Act of the 3d of March, 1797, [1 Stat. at Large, 512.]

MAUL v. SCOTT.

The lien upon the personal property of the debtor, arrested by the delivery of a *feri facias* to the marshal, is lost by the return of *nulla bona*; and is not waived by the delivery of an *alias feri facias* to the marshal, so as to overreach an intermediate sale by the debtor.

THE plaintiff claimed property in a horse, which the defendant, as deputy marshal, had taken as the property of one E. P. Taylor, upon a *feri facias* at the suit of A. B. The horse had been sold by Taylor to the plaintiff, Maul, on the 10th of January, the horse then being in the possession of one Edward Stone, as bailee of Taylor, who on that day gave a written order to Stone to deliver the horse to Maul.

On the 29th of January, a *feri facias* against Taylor was issued in favor of A. B., returnable on the 4th Monday of March, and delivered to the marshal on the 19th of February, and returned *nulla bona*. On the 27th of April, an *alias feri facias* was issued and delivered to the marshal, upon which the marshal took the horse as the property of Taylor.

Mr. Hewitt, for the defendant, contended that the lien, if any, which took place on the 19th of February, continued (notwithstanding the return of that *feri facias nulla bona*.) up to the time of the delivery of the *alias feri facias* to the marshal, on the 27th of April.

Bank of the United States v. Swann.

The COURT, however, (THRUSTON, J., *contrà*,) said that the lien was lost by the return of the *fieri facias*, *nulla bona*, and was not revived by the delivery of the *alias fieri facias* to the marshal.

Verdict for the plaintiff.

Motion for new trial on the ground of misdirection of the jury on that point, overruled.

THE BANK OF THE UNITED STATES v. THOMAS SWANN.

Notice to the indorser, put into the post-office at Washington, for the defendant in Alexandria, on the day after the last day of grace, after the closing of the mail of that day, is too late.

ASSUMPSIT against the indorser of a promissory note due 11th – 14th December, 1819.

The notice to the indorser, who lived in Alexandria, was put into the post-office at Washington on the 15th of December, after the mail of that day for Alexandria had been closed.

The COURT (THRUSTON, J., absent said it was too late.

Non-pros.

CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1823, AT WASHINGTON.

MEYER AND BREMNER v. DAVID WILSON.

If the marshal upon a *capias ad respondendum* be amerced debt and costs *nisi*, the defendant may, on or before the next term give bail and exonerate the marshal.

If the bill of exchange, which was the original cause of action be lost, it is sufficient (in order to amerce the marshal in the whole amount of debt and costs, for not bringing in the defendant arrested upon a *capias ad respondendum*.) to tender to the marshal an assignment of the right of action upon the bill, and that assignment may be made by the attorney and agent of the plaintiff.

THE late marshal (Boyd,) had been amerced damages and costs, for not bringing in the defendant whom he had arrested upon a *capias ad respondendum*. Notice having been served upon R. Wallach, the administrator of the late marshal, to show cause why the judgment should not be final,

Mr. Wallach showed for cause that no tender had been made of the original cause of action, (an accepted bill of exchange.)

Mr. Dunlop, for the plaintiff, produced the affidavit of *Mr. Brent*, the clerk of this Court, showing that the original bill which had been filed in the suit against one Hyatt, had been sought for, but could not be found, and an assignment of the right of action signed by *Mr. Key* and *Mr. Dunlop*, attorneys and agents of the plaintiffs. Whereupon the Court, at the last term, ordered the judgment to be entered against the administrator of the late marshal for the full amount of debt and costs, "*nisi*," the second day of the (then) next term," (that is, the present term.) according to the Maryland Act of 1794, c. 54, § 2, for not bringing in the body of the defendant according to the tenor of the marshal's return.

Upon the second day of the present term, *Mr. Swann*, for the defendant, offered bail for the defendant, Wilson.

Mr. Dunlop, for the plaintiffs, objected that it was now too late.

But the Court (*nem. con.*) permitted the bail to be given, and ordered the judgment to be rescinded.

FREDERICK CANA v. JAMES FRIEND.

If the notary, not finding the indorser at home, leaves a written notice with some one of his family, it is sufficient.

ASSUMPSIT against an indorser of a promissory note, for \$164.80, at four months.

Mr. Wheteroft, the notary public, produced his notarial book in which he had stated that he notified the defendant by letter, all the parties being residents in the city of Washington; and testified that it was his general practice to call at the residence of the indorser, and, if he was not at home, to deliver a written notice to any person who came to the door when he knocked, and to request such person to deliver it to the indorser.

Mr. Caldwell, for the defendant, objected that this was not sufficient notice.

But the COURT (*nem. con.*) said it was sufficient if the jury believed from the evidence that such notice in writing was so delivered at the dwelling-house of the defendant in this case.

Mr. Wallach, for the plaintiff. Verdict for plaintiff.

COX'S ADMINISTRATOR v. WILLIAM JONES.

If the payee of a promissory note, payable to order, indorses it after it has been dishonored, he thereby becomes the drawer of a new bill upon the maker in favor of the indorsee, and is not liable to such indorsee without demand and notice; but he cannot set up, against a remote indorsee, an agreement, with his immediate indorsee, not appearing upon the note itself.

ASSUMPSIT, against the indorser of W. S. Radcliff's note, dated October, 9th, 1816, for \$120, payable thirty days after date to the defendant or order. Long after the expiration of the thirty days, namely, on the 3d of January, 1818, this note was indorsed by the defendant to one Joshua Tennison or order, who indorsed it to the plaintiff's intestate.

The defendant, upon the trial, offered to prove a written separate agreement, between him and Tennison, that he should not be liable as indorser.

The COURT (*nem. con.*) rejected the evidence, and said the indorsement became a new bill. The holder was bound to present the note again to Radcliffe for payment; and, if not paid, to give notice to the defendant, of the non-payment. It would be a fraud in the defendant to indorse the note generally, so as to give a new negotiability to the instrument, and then to set up his secret equity against an innocent holder.

Verdict and judgment for the plaintiff.

ROBERT BOONE v. CHARLES J. QUEEN.

If a promissory note be delivered by the maker to a third person to be delivered to the payee upon his executing such a bond of conveyance as E. B. C. should draw, respecting a contract of sale between the payee and the maker; and such a bond be drawn by E. B. C. and executed by the payee of the note, and thereupon the note be delivered to the payee, he may recover upon it against the maker, although the bond may not be in all respects conformable to the original contract of sale; there not being a total want of consideration. But if the bond be so drawn in consequence of instructions fraudulently given to E. B. C. by the payee, he cannot recover upon the note.

ASSUMPSIT by the payee against the maker of a promissory note for \$1,300 payable twelve months after date. It appeared in evidence that the note was delivered by the defendant to one John Queen with directions to go with the plaintiff to Mr. E. B. C. who was to draw or had drawn a bond of conveyance from the plaintiff to the defendant of the right of the plaintiff and his wife to the real estate of the late Joseph Queen; and that upon the plaintiff's executing such a bond of conveyance as Mr. E. B. C. should draw, or had drawn, the said John Queen was to deliver the note to the plaintiff, all which was done. That the purchase was of the right of the plaintiff and his wife to the personal as well as real estates of the deceased Joseph Queen, and that the personal estate, and a small part of the real estate was not mentioned in the bond of conveyance.

The COURT (THRUSTON, J., absent,) at the prayer of the plaintiff instructed the jury, that if from the evidence they should be satisfied, that the defendant, who was in the possession of the said real estate at the time of the sale, had ever since continued in possession of the same, and enjoyed the profits thereof; and that the said E. B. C. was authorized, by the parties, to draw a bond of conveyance, on the subject of the said agreement, and that John Queen was authorized by the defendant to deliver the said note to the plaintiff upon his executing such a bond as E. B. C. should draw; and that such bond of conveyance was so drawn and executed by the plaintiff, and that the said John Queen delivered the said note to the plaintiff upon receiving the said bond, then there is not such a failure of consideration as will prevent the plaintiff from recovering in this action.

To this instruction the defendant objected, and took a bill of exceptions.

Mr. Wallach and *Mr. Key*, for the defendant, then prayed the Court to instruct the jury, in effect, that if the bond so drawn by E. B. C. did not conform to the agreement of the parties; and that the plaintiff did not instruct, and inform E. B. C. truly and fairly as to the contract between the plaintiff and defendant, the plaintiff was not entitled to recover.

Ault v. Elliot.

This instruction the COURT refused to give, but instructed the jury that if they should be satisfied by the evidence that the plaintiff fraudulently instructed E. B. C. to draw a bond differing materially from the agreement of the parties, and that the bond so drawn did so differ, and that by means of the delivery of the bond so obtained by the fraud of the plaintiff he obtained possession of the said note, the plaintiff could not recover in this action.

To which refusal, the defendant took a bill of exceptions.

Verdict for the plaintiff. No writ of error.

 PHILIP MAURO v. CHARLES W. BOTELOR.

Chairs, left with a painter to be repaired, are not liable for his rent.

REPLEVIN, for fifteen chairs. Avowry for rent arrear. Verdict for the plaintiff, subject to the opinion of the Court upon the following case.

Mauro rented the premises of Ann McGunnigle at \$150 a year, payable quarterly, for the purpose of having chairs painted therein by one Burden, employed by him for that purpose, Mauro paying the workmen engaged in the work. The chairs were deposited there by Mauro while he was such tenant, for the purpose of being painted and finished as aforesaid, and continued there until the premises were rented by one Esby, a chair-painter, and six months afterward. After Esby took the premises Mauro told him he should want the chairs painted by him, but not till he should give an order for that purpose. The chairs remained there four or five months before Mauro gave the order for painting them; and about a month before the distress was laid, he ordered the chairs to be painted and finished, and they would have been finished and delivered before the distress, but that Esby could not get a certain part of the work done in time. The chairs were distrained for two quarters' rent due from Esby. When the distress was laid, Esby was finishing them and kept them in the house for that purpose.

Judgment for the plaintiff, on the case stated.

 AULT v. ELLIOT, Special bail of Morté.

Upon motion of the special bail, at the return of the *scire facias*, the Court will set aside the original judgment against the principal, for irregularity, and will quash the *scire facias* against the bail.

UPON the return of the *scire facias* against Elliot, who was spe-

Negro Jordan v. Sawyer.

cial bail of Morté, *Mr. Redin*, for the bail, obtained a rule upon the plaintiff to show cause why the original judgment against Morté should not be set aside for irregularity, and the subsequent proceedings against the bail, quashed. The original judgment was rendered in December, 1819, by confession without any declaration, or rule to declare, or to plead. In support of the rule *Mr. Redin* cited Tidd, 242, 1093, 1094, and 1146; *Hayward v. Ribbens*, 4 East, 310, 313; *Barlow v. Kaye*, 4 T. R. 688; *Hardy v. Moore*, 3 Har. & McHenry, 389, and *Bowie v. The State of Maryland*, Id. 408. On the 22d of June, 1824, the COURT made the rule absolute, and ordered the original judgment to be set aside, and the continuances entered up, and all the subsequent proceedings to be quashed.

UNITED STATES v. WILLIAM CRANDELL.

The person intended to be injured by a forgery, and the person whose name is forged to a certificate, are competent witnesses to prove the forgery. But if the witness has paid money upon the forged paper, he is not competent to prove the forgery.

THERE were three indictments against the defendant for forgery. In one he was charged with forging a certificate purporting to be signed by one Henry Naylor, with intent to defraud one Holmead.

Mr. Key, for the defendant, objected to Naylor and Holmead as witnesses for the prosecution.

The COURT (THRUSTON, J., absent,) overruled the objection. Upon another indictment against him for forgery, a witness was sworn who had paid five dollars upon the forged paper. The COURT instructed the jury, that he was not a competent witness. (CRANCH, C. J., doubting.) Upon a third indictment for forging the name of G. Bomford to a bond, with intent to injure one Digges.

Mr. Key, for the defendant, objected to Digges as a witness, but the objection was overruled by the Court.

NEGRO WILLIAM JORDAN v. LEMUEL SAWYER.

To obtain freedom under the Maryland Act of 1796, c. 67, the slave must have been imported "for sale," or "to reside."

The Court will not compel a party to join in a demurrer to the evidence, unless the other party will admit all such facts as might be fairly inferred from the evidence.

A slave imported into the county of Washington for sale, and sold within three years after such importation, is entitled to freedom, although the object and intention of both purchaser and seller were that the slave so purchased should be carried, forthwith, out of the District of Columbia, by the purchaser.

Negro Jordan v. Sawyer.

Quære, whether the actual sale of the slave, within three years after the importation, is conclusive evidence that the importation was "for sale."

The Act of Maryland of 1796, c. 67, concerning the importation of slaves, is in force in the county of Washington, although in terms it is applicable only to the State of Maryland.

THIS was a petition for freedom.

Mr. Hay, for the defendant, offered to demur to the plaintiff's evidence.

Mr. Cox and *Mr. Key*, for the plaintiff, refused to join in the demurrer, unless the defendant would admit that the petitioner was imported by one Peyton "for sale;" and contended that upon a demurrer to evidence the party demurring must admit all the facts which the evidence conduces to prove; and cited Tidd, 854; Phil. on Ev. 216; and the case of *Patty v. Edelin*, in this Court at January term, 1802, (1 Cranch, C. C. 60.)

The COURT (THRUSTON, J., absent,) said that when a demurrer to evidence is joined, the Court is to draw all the inferences of fact which a jury could reasonably draw; and that a party cannot be compelled to join in the demurrer, unless the party demurring will admit all the facts which the jury could reasonably infer from the evidence.

The COURT was of opinion that the jury, from the evidence, might infer that the petitioner was imported "for sale," and refused to compel him to join in the demurrer unless the defendant would admit that fact. *Mr. Hay*, for the defendant, took a bill of exceptions to the Court's refusal to compel the petitioner to join in demurrer.

Mr. Hay, then contended that this county was not a part of the State of Maryland in 1796, when the act was passed, so that it was never in force here, and therefore could not continue in force here under the Act of Congress of the 27th of February, 1801, [1 Stat. at Large, 103.] This part of the district was ceded by Maryland to the United States, on the 19th of December, 1791, and ceased to be a part of that State.

The COURT (THRUSTON, J., absent,) stopped *Mr. Hay*, and told him that the question had been long settled, both by this Court and the courts of Maryland, that the jurisdiction of Maryland continued until Congress provided by law for the government of the District, which did not take place till the 27th of February, 1801, and that the Maryland Act of 1796, c. 67, was adopted with the other laws of Maryland, by the Act of Congress of 27th February, 1801, [1 Stat. at Large, 103.] That this Court would not now undertake to overrule all the decisions which have been had upon those points, and declined hearing any further argument thereon.

Negro Jordan v. Sawyer.

Mr. Key, for the petitioner, then moved the Court to instruct the jury, that if they believe from the evidence, that Valentine Peyton brought the petitioner from Wheeling, in Virginia, into this county, in the beginning of the last winter, and that in March last, some time after such importation, the said Peyton determined and intended to sell the petitioner in this county, and did actually sell him therein to the defendant, then the petitioner is entitled to recover, unless the defendant can prove that the said Peyton came into this county with a *bonâ fide* intention of settling therein, and had resided there three years before such sale, or that he came within the provisions contained in the 2d, 4th, 7th, 8th, 9th, or 11th sections of the Act of 1796.

But the COURT refused to give the instruction, being of opinion that in order to give a right of freedom to a slave on the ground of importation, he must have been brought in "for sale or to reside."

Mr. Key, for the petitioner, then prayed the Court to instruct the jury that if they should be satisfied by the evidence, that Peyton brought the petitioner here from Virginia in March last, and sold him here, he is entitled to freedom.

Mr. Key cited the case of *Dunbar v. Ball*, in this Court, at October term, 1821, (*ante*, 261,) in which he contended this point was directly decided by the Court. He cited also the case of *Negro Lanna and child v. Pumphry*, decided at the last term in this Court, (CRANCH, C. J., absent.)

Mr. Hay submitted the question without argument.

The COURT (THRUSTON, J., absent,) said that the Maryland Act was very obscure. The first is the only section which gives freedom to the slave, and it gives it only when the slave is imported "for sale or to reside within the State." The 2d section provides, that citizens of the United States, who may come into the State with a *bonâ fide* intention of settling therein, may, at the time of their removal, or within one year thereafter, bring in the slaves owned by them at the time of their removal. But the 3d section provides, that nothing therein contained shall be construed to enable them to sell such slaves, unless they shall have resided in the State three whole years next preceding such sale. The 4th section provides that nothing in the act shall be construed to affect the right of persons travelling or sojourning with any slave; such slave not being sold, or otherwise disposed of, in the State, but carried, by the owner, out of the State, or attempted to be carried.

The 4th section does not give any penalty for selling; and such sale is not within the first section, unless the traveller brought the slave "for sale or to reside." Yet it seems to be the intention of

the legislature to prohibit such sale. If such was their intent, we must construe the 4th section to mean that such a sale must be considered as conclusive evidence that the slave was imported for sale; and such we are inclined to think must be the construction, if, to bring a person under the penalty of the 1st section, it be necessary that the importer should bring him in "for sale."

The jury found a special verdict, stating the following facts:—

That the petitioner, early in January, 1823, was brought into this county from Wheeling, in Virginia, by Valentine Peyton, who never has been a resident of this county or district, and who sold the petitioner to the defendant in this county some time in March, 1823. That it was agreed between the seller and the purchaser, (the defendant,) that the petitioner should be sent by the defendant, forthwith, to Norfolk in Virginia, which was done; and that when he was put on board the steamboat for Norfolk, the purchase-money was paid by the defendant. That the petitioner returned in the steamboat, and filed his petition. That Peyton was not a person coming into this county to reside therein; but as a sojourner or traveller, and that he did not carry the petitioner with him when he went away, without selling him, or attempting to carry him away without selling him. And that there is no evidence from which the jury can find that the said Peyton brought the petitioner into this county under any of the circumstances set forth in the provisos contained in the 7th, 8th, 9th, 10th, and 11th sections of the Act of 1796, c. 67.

The COURT (MORSELL, J., *contra*,) was of opinion, that upon this special verdict, the law was for the defendant, because the jury had not found that the petitioner was brought in "for sale or to reside."

But at the request of *Mr. Key*, in the absence of *Mr. Hay*, the Court suspended the judgment until the next term, when the case was settled by the parties.

JOHN P. VAN NESS & ux. v. UNITED STATES *et al.*

Under the Act of Congress of the 7th of May, 1822, authorizing the Corporation of Washington to drain the low grounds, &c. and the representative of the former proprietor to institute a bill in equity, in the nature of a petition of right, against the United States, this Court cannot grant an injunction to prevent the execution of the act.

By that act, the power to sell the lots is absolutely vested in the Corporation of Washington, and the Court has only authority to decide what proportion, if any, of the money arising from the sale the complainants may be entitled to.

The Court has no authority under the act, to require the Corporation of Washington to give security for the payment of a moiety of the proceeds of sale to the complainants.

BILL in equity, in the nature of a petition of right, filed under

the authority given by the 6th, 7th, 8th, and 9th sections of the Act of Congress of the 7th of May, 1822, c. 96, [3 Stat. at Large, 691,] entitled "an act to authorize and empower the Corporation of the city of Washington, in the District of Columbia, to drain the low grounds on and near the public reservations, and to improve and ornament certain parts of such reservations."

By the 6th section it is enacted, "That it shall be lawful for the legal representative of any former proprietor of the land directed to be disposed of by this act, or persons lawfully claiming title under them, and they are hereby permitted and authorized at any time within one year after the passing of this act, to institute a bill in equity, in the nature of a petition of right, against the United States, in the Circuit Court of the United States for the District of Columbia, in which they may set forth the grounds of their claim to the land in question.

Section 7. That a copy of said bill shall be served on the attorney-general of the United States, and it shall be his duty to prepare and put in the proper pleas and answer, and make all proper defence thereto, in behalf of the United States.

Section 8. That the said suit shall be conducted according to the rules of a court of equity. And the said court shall have full power and authority to hear and determine upon the claim of the plaintiff or plaintiffs, and what proportion, if any, of the money arising from the sale of the land hereby directed to be sold, the parties may be entitled to.

Section 9. That the plaintiff, or plaintiffs, or the attorney-general of the United States shall be entitled to an appeal to the Supreme Court of the United States, whose decision shall be conclusive between the parties; and should no appeal be taken, the judgment or decree of the said Circuit Court shall, in like manner, be final and conclusive."

The 2d section of the act, authorized the Corporation of Washington to cause certain grounds in the city, designated as "Public Reservations, No. 10, 11, and 12," to be divided into building lots, and to sell the right of the United States in those lots, and with the proceeds of sale to make certain improvements mentioned in the act.

The bill was filed by John P. Van Ness, and Marcia, his wife, who was the sole heir at law of David Burns, who was the proprietor of the land in question, when the city was laid out. They contended, that under the original deeds of trust, these public reservations were to be always held by the United States for public purposes, and not to be sold as building lots for private use; and that if converted into building lots, the original proprietors were entitled to one half of them, for the same reason that they

were entitled to the moiety of the lots originally designated as building lots, to be alternately selected by the public and the original proprietor; and for this purpose they prayed that the Corporation of Washington, which was made a defendant to the bill, might be enjoined from selling, until the building lots should be so selected and allotted. (See the case as reported in 4 Peters, 232.)

The case was argued by *Mr. Hay*, for the complainants, and by *Mr. Jones* for the United States, and the Corporation of Washington, upon the motion for an injunction.

Mr. Hay referred to the original agreement with the proprietors of the land and the deed of trust, which were executed to Beall and Gantt; the act of cession by the State of Maryland; the Acts of Congress of May 6, 1796; April 18, 1798; January 12, 1809, § 8; February 24, 1817; The Minutes of the Proceedings of the Commissioners in the case of Samuel Davidson in 1794, and the opinion of Mr. Brackenridge.

Mr. Jones, for the defendants, relied upon the terms of the deeds of trust, whereby the reserved squares were to be held in trust "for the use of the United States."

CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., absent.)

This is a bill in equity, in the nature of a petition of right, filed by virtue of the leave for that purpose given by the Act of Congress of the 7th of May, 1822, c. 96, § 6, [3 Stat. at Large, 691.]

It prays an injunction to prevent the Corporation of Washington from selling the lots which by the said act the Corporation is authorized to lay off and sell.

The ground, upon which the injunction is requested, is, that by such sale under the authority of the United States, they would forfeit their right in the land, and it would revert to the complainants, who would thereby become entitled to the whole land itself. The complainants, however, state that they are not disposed to insist on their strict right to the whole land, but are willing to be placed in the like condition as their ancestor would have been in, if the same land had been laid out into building lots in the year 1792, immediately after the execution of the deed of trust. They are willing to take every alternate lot.

It will be perceived that the complainants seek to prevent the completion of the act which is the ground of their claim; so that if the Court should perpetually enjoin the sale of the lots, their claim must entirely fail.

It must be evident, therefore, that the complainants have not yet a ground to claim an injunction. It is also evident, that as their title must be founded on the sale, the sale can do them no injury. If they should become legally entitled to the land they may main-

Ex parte Burr.

tain their ejectments against the purchasers. If the complainants claim under the Act of Congress, they cannot deny its validity. They must take only what that act gives them.

The COURT is of opinion that, by that act, the power to sell the lots is absolutely given to the Corporation; and that it makes no provision for suspending the sales, even if the Court, upon a bill, in the nature of a petition of right, filed under that act, should be of opinion that the complainants have a good claim to the land.

The COURT is also of opinion that the power and authority given, by the act, to this Court to hear and determine upon the claim of the complainants, is given merely for the purpose of enabling the Court to determine what proportion, if any, of the money arising from the sale of the land, the complainants may be entitled to.

The objects, contemplated by the act, are of a public nature, and highly important in regard to the health of the city. The act gives no power to the Court, in any event, to prevent the accomplishment of those objects. We cannot, upon a bill filed under the act, authorize a proceeding which shall suspend its execution.

In regard to the motion last made by the complainant's counsel, that an injunction should be awarded until security should be given by the Corporation to pay one moiety of the proceeds of the sales of the lots, in case the Court should decree a portion thereof to the complainants, —

The COURT is of opinion, that, upon a bill filed under the leave given by the act, it has no authority to require such security. We consider our authority, in a case in which we have cognizance only by virtue of the act, limited to the powers given by the act itself; and we are not sure that the United States are not bound, in good faith, by the act to guaranty the payment of the money which the Court may award. The United States have made the Corporation their agent to carry into effect the objects of the act; and have reposed in it a confidence which the Court cannot presume it will abuse.

The motion of the complainant's counsel, for an injunction, is therefore overruled.

The COURT, at a subsequent term dismissed the bill, and upon appeal to the Supreme Court, the decree of this Court was affirmed, in January, 1830. 4 Peters, 232.

Ex parte LEVI S. BURR.

This Court has authority to suspend an attorney of the Court from practice for a

Ex parte Burr.

limited time, or to expel him entirely: and may, for that purpose, inquire, in a summary manner, as to any charges of malpractice alleged against him.

CRANCH, C. J., delivered the opinion of the Court (*nem. con.*) as follows: In the argument of a cause in this Court Mr. Burr was charged, by counsel of great respectability, with practices, unbecoming a practitioner at the bar. It was said that the charges were not made unadvisedly, and could be supported. Mr. Burr denied the truth of the allegations, and challenged an investigation. The Court thought it important to the character both of the accused, and the accusing party, as well as to the purity of the administration of justice, that charges so deliberately made, should not pass without notice. They therefore requested the gentleman, who had made the accusation, to state the charges in writing. This was done in the form of a letter to Mr. Burr, in these words:

"Sir, — The circumstances which I considered as justifying and obliging me to make the observations I did to the Court, to-day, are these:

"My own observations of your conduct in Alexandria relative to the letter of Ben. F. Clarke, produced in the trial of that cause, which you stated resembled the writing of a letter in your possession from a man of that name.

"Information which I have received, during this term from Mr. G. H. Gloyd, and several other persons relative to your advising a man in jail, who was either a recognized witness, or a defendant for whom some person was special bail, to run away.

"Information received for Mr. Beale and others relative to your instituting a suit or suits against a Mr. Henshaw for some person, without any authority from the said plaintiff for so doing.

"4th. Information received from Mr. Van Ness and several others, and confirmed by the appearance-docket of this term, of your bringing many frivolous and vexatious suits, and many of them for persons utterly insolvent.

"Information received from Mr. Ringgold, Mr. Dawson, and others, of your soliciting captain Crabb for his business, and appearing for him without authority; and for appearing generally for persons without authority; and particularly for Charles Burns, as stated by him.

"Information from Mr. Golding, and the evidence of his boy about the account in bar filed by you against his account against you, in the case in which you were warranted.

"Information from Mr. Van Ness as to your purchasing in a lot at a trustee sale of Patrick Nicholson, an insolvent's estate, under unfair and improper circumstances.

Ex parte Burr.

“Information from Mr. Beale and Mr. Waters, as to your making fictitious claims, and bringing suits with a view to extort money : also to taking a bill of sale from who was about to be distrained for rent by Thady Hogan, to prevent such distress, and taking an order from Patrick Nicholson on the corporation for \$0 or \$90, for writing his insolvent papers, he, the said Nicholson being in jail, and imposed upon in obtaining said order.

“Information as to your conduct in soliciting business at the jail, and of other persons, and general reputation as to your ill-conduct in your profession.

“Above I have stated the circumstances and reports, to which I have alluded, and if you can explain them, or show them to be ill-founded, I will gladly acknowledge that I have done you injustice. Yours, F. S. Key.

“April 26, 1823.”

The Court, supposing that the only ground of their jurisdiction to investigate the matter by an examination of witnesses, was its discretionary power to admit attorneys and counsellors to practise in the Court, and to exclude them from practising, for improper conduct, made the following order :

“The following suggestion of charges, having been made to this Court, of the improper conduct of Levi S. Burr, one of the attorneys of this Court, It is ordered that the said Levi S. Burr show cause, on the day of why his name should not be struck off the roll of attorneys of this Court.”

On the 5th of June, there having been an intervening adjournment of the Court, the cause came on to be heard ; and before the examination of witnesses, Mr. Burr read to the Court a paper which he termed a representation and remonstrance, in which he stated that he objected to the investigation because the charges were not exhibited against him upon oath, but did not object to the investigation of charges properly brought before the Court. He seemed to think that the power of the Court is limited to his official acts as an attorney, and perhaps to such only as should have been committed in violation of some express rule of Court.

To the first charge he objected that it contained no specific allegation of any thing improper.

To the 2d, that it was absurd in itself, and contradictory ; and denied that he advised any witness or other person to run away.

To the 3d, which related to his bringing an action against Mr. Henshaw, without authority from the plaintiff ; he answered that he conceived himself to have been authorized by the plaintiff so to do, or he would not have done it ; and that the plaintiff has sustained no injury.

To the 4th allegation, which charges him with having brought

Ex parte Burr.

many frivolous and vexatious suits for insolvent persons, he answers that the question whether the suits were frivolous and vexatious, cannot be ascertained until they shall have been tried.

To the 5th allegation, which charges him with soliciting business from Captain Crabb, and appearing for him and other persons without authority, he answers that it is no offence to solicit business, and that he supposed himself authorized to appear in the cases referred to. That no improper motive is charged, and no injury alleged to have been sustained by any person.

To the 6th, which relates to the account in bar in Golding's case, he answers, that the judgment of the justice of the peace was in his favor; and that this Court reversed the judgment because it had been decided by this Court that a counsellor's fee for advice could not be recovered in a suit at law, and therefore did not form a legal set-off to the plaintiff's demand. He states that he had no knowledge of such a decision, but supposed he had a good right to make the set-off.

To the 7th, which relates to his purchasing a lot at the trustee's sale of P. Nicholson's estate, he objects that it is a charge against him as a private citizen, and not as a member of the bar, and that in regard to it he cannot be deprived of his trial by jury. He objects also that the nature of the unfair and improper circumstances is not stated.

To the 8th, which relates to his making fictitious claims, and bringing suits with a view to extort money; the taking a bill of sale to prevent the distress of Thady Hogan for rent, and imposing upon P. Nicholson, by taking an order from him on the corporation for eighty or ninety dollars for writing his insolvent papers; he objects that the first allegation is too vague and indefinite to be answered. That the other two allegations contained in this charge, relate to him as a citizen, and not as an attorney of this Court, and involve facts which can only be ascertained by jury; and that if either of those persons has been injured, redress is open to him in the common way.

To the 9th, which relates to soliciting business at the jail, and from other persons, and to his general reputation as to his ill conduct in his profession, he answers that as to his soliciting business, there is nothing improper in it, in itself, nor is any thing improper alleged; and as to general reputation, it is too vague a charge to be specifically answered, but he fears not to meet it. The remonstrance concludes with these words:—

“Having thus waded through this congregated mass of absurdities, it only remains for a remonstrance and protest to be made against them, which is hereby solemnly made,—Because the charges are not sufficiently explicit. Because they are untechni-

Ex parte Burr.

cally and inartificially made. Because they are too inquisitorial, particularly as to matters of fact. Because they carry prejudice and malignity on the very face of them. Because they have not been exhibited upon oath. Because they prejudge facts which can only be established by the verdict of a jury. Because they are illiberal, uncharitable, and unbecoming a Christian community. Because they breathe, throughout the whole of them, a spirit of intolerance. Because they are calculated to entrap. Because they cannot be fairly answered, and because they are untrue."

No preliminary question having been made to the Court, the witnesses were examined on the 6th, 7th, and 8th of June.

At the close of the testimony, *Mr. Hay* asked leave to make some observations upon the power of the Court to proceed in this manner against an attorney of the Court, and Wednesday, the 11th of June, was assigned for hearing his argument.

Mr. Hay contended that this was a criminal prosecution, and of a high grade. That the facts ought to be precisely stated, and must show that an offence has been committed, and that no accusation ought to be heard, but such as related to the conduct of *Mr. Burr*, as an attorney of this Court.

After commenting upon the nature of the several allegations, which he considered as containing thirteen distinct charges, he denied that this summary mode of investigation was warranted by the Constitution of the United States, and cited the 2d § of the 3d article, which declares that the trial of all crimes shall be by jury, except in cases of impeachment; and those amendments of the Constitution which provide that no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment of a grand jury, except in cases arising in the land or naval forces; and that in all criminal prosecutions, the party shall enjoy the benefit of the trial by jury.

He contended that the Courts of the United States have no power to punish contempt in a summary manner; that the Act of Congress, which purports to give them that power, is unconstitutional, because repugnant to the clauses of the Constitution before mentioned. That the powers of this Court by the 3d § of the Act of the 27th of February, 1801, [1 Stat. at Large, 103,] are limited by the powers given to the Courts of the United States. That if the Act of Congress which gives the Courts of the United States the power to punish contempts were constitutional, it would only authorize those Courts to punish them by fine and imprisonment, not by suspension or deprivation of office; and would not authorize the punishment of contempts, not committed in the immediate presence of the Court. That the Court has no power but what is expressly given, and cannot expel an attorney from the bar.

Ex parte Burr.

The power of this Court to expel an attorney from the bar, having been now for the first time questioned, it is proper to inquire upon what ground it rests.

By the Act of Congress of the 27th of February, 1801, [1 Stat. at Large, 103,] it is enacted, that the laws of Maryland, as they then existed, should continue in force in that part of the District of Columbia which was ceded by the State of Maryland to the United States. Those laws consisted of the common law of England; such of the English statutes as existed at the time of the first emigration to Maryland, and which, by experience, had been found applicable to the local and other circumstances of the inhabitants; and of such other statutes as have been since made in England or Great Britain, and have been introduced, used, and practised by the courts of law or equity; and of the Constitution, Bill of Rights, and Acts of Assembly of that State, as modified by the Constitution and laws of the United States. It follows, therefore, that the laws of England respecting attorneys of courts, as well in relation to their rights, privileges, and duties, as to the power of the courts over them, so far as those laws were found applicable to the local and other circumstances of the country, are in force in this part of the District of Columbia.

It is said that, "in ancient times, by the law of England, those of authority in courts, had it in their power, whether they would suffer men to appear or sue by any other but themselves. The courts, therefore, had a right to say by what attorney a party should appear. Afterwards, however, it became customary for parties to obtain the King's writ, commanding the courts to admit them to appear by attorneys specially named in the writ. Subsequent statutes, however, (West. 2, c. 10, &c.) gave all persons a liberty of appearing and appointing an attorney, as if they had letters-patent. As this liberty soon became abused by the appointment of ignorant attorneys, the stat. 4 H. 4, c. 18, was enacted in the year 1402." It is entitled, "The punishment of an attorney found in default," and is in these words:—

Item. For sundry damages and mischiefs that have ensued before this time, to divers persons of the realm, by a great number of attorneys ignorant and not learned in the law, as they were wont to be before this time: It is ordained and established, that all the attorneys shall be examined by the judges, and by their discretion their names put upon the roll; and they that be good and virtuous, and of good fame, shall be received and sworn, well and truly to serve in their offices, and especially that they make no suit in a foreign country; and the other attorneys shall be put out by the discretion of the said justices; and that their masters, for whom they were attorneys, be warned to take others in

Ex parte Burr.

their places, so that in the mean time no damage or prejudice come to their said masters; and if any of the said attorneys do die, or do cease, the justices for the time being, by their discretion shall make another, in his place, which is a virtuous man and learned, and sworn in the same manner as afore is said; and if any such attorney be hereafter notoriously found in any default of record or otherwise, he shall forswear the court, and never after be received to make any suit in any court of the King; and that this ordinance be holden in the exchequer, after the discretion of the treasurer and of the barons there."

This statute was in force in Maryland in the year 1801, as appears by the report of Chancellor Kilty, made by the authority of an Act of the Legislature of that State.

The power of the courts, in their discretion to admit and expel attorneys, has been recognized by many subsequent statutes and judicial decisions; and in the year 1715, the Assembly of Maryland passed an Act, (c. 48,) by the 12th section of which, it is enacted, that "No attorney, or other person whatsoever, shall practise the law in any of the courts of this province, without being admitted thereto by the justices of the several courts, who are hereby empowered to admit and suspend them, (*salvo jure coronæ*) until his Majesty's pleasure shall be known therein." And in 1719, the Legislature of Maryland passed another Act, (c. 4,) by the 2d section of which, it is enacted, "That the several magistrates, judges of the several courts within this province be, and hereby are, authorized, and strictly required, to observe the demeanor of all practitioners of the law before them, as well as all ministerial officers, or other persons who shall use any indecent liberties to the lessening of the grandeur and authority of their respective courts, and to discountenance and punish the same according to the nature of the offence, either by suspending such practitioners of the law from their practice perpetually, or for a time, or to punish such practitioners or ministerial officers or other persons by fine, at the discretion of such court before whom such offence shall be committed, not exceeding 4000 pounds of tobacco in the superior courts, nor 2000 pounds of tobacco in the several county courts within this province, on each offender for any one offence," and by the 10th section it is provided, "that nothing in this act shall be construed to lessen the authorities vested by law, in the several courts, or in any of the magistrates, before the making of this act."

By the law of England, recognized as the law of Maryland by the courts of that State, attorneys are officers of the court, and are liable to be punished in a summary way, either by attachment, or by having their names struck out of the roll of attorneys,

Ex parte Burr.

for any ill practice attended with fraud or corruption, and committed against the obvious rules of justice and common honesty; but it is said that the Court will not easily be prevailed upon to proceed in this manner, if it appears that the matter complained of was rather owing to neglect or accident than design.

Hawkins, B. 2, c. 72, § 6, speaking of the process of attachment against attorneys, says there is no doubt the Court may so proceed against them for taking upon them to prosecute or defraud a suit for another without any manner of directions from him; but it is not usual to grant attachments in these cases without some apparent circumstances of fraud or corruption. So attachment lies against them for injustice done to their clients; as by protracting suits by little shifts and devices; putting parties to unnecessary expenses to increase their fees; for demanding fees for business which was never done; or for refusing to deliver up to their clients, writings with which they had been intrusted in the way of business; or money which has been recovered and received by them to their clients' use; and for other such gross and palpable abuses. But the Court will not interfere in this manner (at the instance of the injured party) as to any writings or money received by an attorney on any other account except only in his way of business as attorney; but will leave the party to his ordinary remedy by action.

The Court will also proceed by attachment against attorneys, not only for disobedience of its rules after notice of such rules, either express or implied, but also for any such ill practice as is against the known and obvious rules of justice and common honesty; as for forging a writ, or any other matter of record; or but attempting to do so; or for taking out a *capias* which has no original to warrant it; or for endeavoring to impose on the Court; or for giving directions to a sheriff concerning what persons he should return on the panel; and for other misdemeanors of the like nature. In all these cases the courts proceed by attachment at the instance of the party injured.

It was said in argument that courts will inquire only of the official acts of their attorneys, as attorneys. But can it be said that if an attorney should be convicted of highway robbery, or larceny, or forgery, or any other infamous crime, or grossly dishonest conduct, the Court must close its eyes? must refrain from inquiry? Is not the respectability of the Court in some measure connected with that of the bar? A regard to the purity of the administration of justice demands that the bar should be pure and honest, and, if possible, highly honorable. The members of the bar act, in this country, in the double capacity of attorneys and counsellors. As counsellors the Court reposes in them great

Ex parte Burr.

confidence. It cannot doubt their honor and integrity ; and it is the duty of the Court to see that they conduct themselves in such a manner as to deserve that confidence.

This is not a new doctrine. In the case of *Brounsall*, Cowp. S29, application was made to the court of King's Bench in England to strike the defendant off the roll of attorneys, he having been convicted of stealing a guinea, five years before the application, and having been burnt in the hand and suffered five years' imprisonment ; and no misconduct since, having been imputed to him. It was contended that the benefit of clergy which he had received, and his burning in the hand operated as a statute pardon ; and that to strike him off the roll would be to punish him twice for the same offence.

Lord Mansfield said, " this application is not in the nature of a second trial, or a new punishment ; but the question is whether after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion. Suppose he had been a justice of the peace, the conviction itself would not remove him from the commission ; but could there be a doubt that he ought to be struck out of the commission ? As at present advised, I am of opinion, without any doubt, that the rule should be made absolute. But as it is for the dignity of the profession that a solemn opinion should be given, we will take an opportunity of mentioning it to all the judges." The reporter afterwards says, " Lord Mansfield, on this day, said, we have consulted all the judges upon this case, and they are unanimously of opinion, that the defendant's having been burnt in the hand is no objection to his being struck off the roll ; and it is on this principle, that he is an unfit person to practice as an attorney. It is not by way of punishment ; but the Court, in such cases exercise their discretion, whether a man whom they have formerly admitted, is a proper person to be continued on the roll, or not. Having been convicted of felony, we think the defendant is not a fit person to be an attorney ; therefore let the rule be made absolute." That case was decided in the year 1778, and shows what the law of England was at the time of our separation. The law in Maryland was the same ; and so continued until the 27th of February, 1801, when the county of Washington was finally separated from the State of Maryland. That case decides the principle, that the Court will strike from the roll an attorney who by his conduct, although not official, has shown himself not to be a fit person to be an attorney.

We think the same doctrine prevails in Virginia. In *Leigh's case*, 1 Munford's Reports, 481, Judge Roane says, " with respect to these public attorneys, or attorneys at law ; in order to insure

Ex parte Burr.

a due degree of probity and knowledge in their profession, so indispensable to persons acting in that character, none are permitted to act as such but those who are allowed by the judges to be skilled in the law, and certified by the court of the county of their residence, to be persons of honesty, probity, and good demeanor.

“ Having obtained the sanction of these two tribunals, touching these two particulars, an attorney is licensed, or allowed to practice ; and the courts have, also, a continuing control over them, with power to revoke their licenses for unworthy practices or behavior.”

In our own Court three cases have occurred, in which the court has ordered the name of an attorney to be stricken from the roll.

The first case was that of *Robert Ware Peacock*, who was convicted of forgery on the 31st of January, 1805, (1 Cranch, C. C. 251.)

The second was that of *Thomas Herty*, on the 2d of February, 1811, who was by the verdict of a jury found “ guilty of conduct and practices derogatory of the high and honorable character which an attorney of this court ought to maintain, in colluding with, and knowingly assisting a debtor to defraud his creditors under color of law.”

The third was the case of *James A. Porter*, in January, 1813, (*ante*, 60.) He was indicted for some dishonorable conduct in regard to a person of the name of Jenkins, and found guilty. The Court, however, arrested the judgment because the offence charged was not indictable at common law. But the Court, without hesitation, ordered his name to be stricken from the roll of attorneys.

In neither of those cases was the power of the Court called in question.

But it is now said at the bar, that no court in this country, has any power but what is expressly given by statute. That such is the law of England in regard to all new tribunals ; and all the courts in this country are new tribunals. That by the Act of Congress of the 27th of February, 1801, [2 Stat. at Large, 103,] by which this Court was erected, its powers, and the powers of its judges, are limited by the powers given to the Circuit Courts of the United States then in existence ; and that it can exercise no other ; and that among those powers, that of expelling an attorney is not given ; and that the clause of the Judiciary Act which authorizes the courts of the United States to punish contempts by fine and imprisonment, if it be construed to include the summary jurisdiction, is in that respect unconstitutional.

Ex parte Burr.

In answer to this it may be said, that no express power is given to the courts of the United States to admit attorneys in civil causes; and there seems to be no reason why they should not have as good a right to expel, as to admit. Can it be imagined that if a court, without authority, permit an attorney to practice in that court, it has no power to revoke such permission, if it finds itself imposed upon in regard to the skill or integrity of the attorney?

An Act of the Assembly of Maryland applicable to all the courts, is as much the law of Maryland as any other Act of Assembly, and is not the less law because it confers certain powers on the courts. So also is an Act of the Legislature of Maryland in regard to the admission and expulsion — the rights and duties of attorneys.

The Act of Congress of the 27th of February, 1801, [2 Stat. at Large, 103,] constituting this Court, has not said that it should have no other powers than those given to the courts of the United States. By the first section of that act it is declared that the laws of Maryland should remain in force in this part of the district. Among those laws were many relating to the powers and jurisdiction of courts. Some of those laws were Acts of Assembly; some were English, and some were British statutes; some were parts of the common law of England; and some were constitutional provisions. Congress probably knew, or supposed, that there might be powers which had been given to the courts of the United States, which did not belong to the State courts of Maryland; and as this Court was to be a substitute for both State and United States courts, it was necessary to give it the jurisdiction of both. It is therefore a reasonable, if not a necessary construction of the Act of Congress, to consider it as intending to superadd the powers of the courts of the United States to those of the State courts. This has been the uniform and universal construction given to the act, by this Court; and a great, perhaps the greater, part of the jurisdiction it has exercised during the whole period of its existence depends upon that construction.

If, therefore, the principle be admitted, that all the courts in this country are new tribunals, and that no new tribunal can exercise a power not expressly granted, we think that Congress, by adopting the laws of Maryland without restriction, have expressly granted to this Court all the powers, of a general nature, which, by the laws of Maryland, were conferred upon courts of similar jurisdiction; and, among the rest, those powers which by the laws of Maryland were given to the courts of that State, to admit and expel attorneys.

Ex parte Burr.

But it has also been said in argument, that this must be considered as a criminal prosecution; and that Mr. Burr is therefore entitled to all the privileges secured by the Constitution of the United States to persons so prosecuted.

The argument to prove that this is a criminal prosecution, is understood to be substantially this: that as this Court might, by the law of England, have proceeded by attachment of contempt against the attorney, as for a constructive contempt of court, it ought to be so considered; and if it had been an attachment of contempt it would have been a criminal prosecution, and the party is therefore entitled to a trial by jury.

The object of an attachment of contempt is to punish the offender by fine and imprisonment. The object of the present proceeding is to purify the bar; and the utmost power which the Court can exercise against the party, upon this proceeding, is to strike his name from the roll.

In cases of attachment the party has a right to exculpate himself upon oath; in the present case he has not; and indeed this is made a subject of complaint.

It seems to the Court too plain for argument that this is not, and cannot be considered as an attachment of contempt. But if it were, we do not think that the party would be entitled to a trial by jury.

The clauses of the Constitution of the United States, relied upon by the counsel, in argument, were that part of the second section of the third article, which is in these words: "The trial of all crimes, except in cases of impeachment, shall be by jury;" and the fifth amendment, which declares, "that no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person, for the same offence, be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." And the sixth amendment, which declares, "That in all criminal prosecutions the accused shall enjoy the right of a speedy and public trial by an impartial jury of the State or district wherein the crime shall have been committed; which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."

Ex parte Burr.

This part of the argument did not seem to the Court to bear much upon the subject before us, which was not considered as either an attachment for a contempt, or a criminal prosecution ; but simply as an inquiry whether the Court, in the exercise of its discretion, should not revoke the permission heretofore given to Mr. Burr to practise as an attorney in this Court. The Court, however, will observe that the clauses of the Constitution of the United States, which have been cited, are, in substance, as it is believed, contained in many, if not all, of the constitutions of the several States ; and even in the celebrated Magna Charta of England ; yet the courts of England, and, it is believed, the courts of all the States, as well as of the United States, during their whole period of existence, have claimed and exercised the power of punishing contempts in a summary manner ; and in those States which have courts of chancery, the greater part of the compulsory process of such courts is grounded entirely upon that power. This Court has exercised it ever since its creation, and its right has never before been questioned.

We do not think it necessary to cite authorities to prove that this power has been exercised by the courts of the several States. The fact is known to every person in the least conversant with judicial proceedings ; and to show that it is claimed by the courts of the United States, we shall cite only two cases decided by the Supreme Court of the United States.

The first is that of *Anderson v. Dunn*, decided in 1821, and reported by Mr. Wheaton, vol. 6, p. 204. In that case the judge, delivering the opinion of the Court, says, " That the safety of the people is the supreme law, not only comports with, but is indispensable to, the exercise of those powers in their public functionaries, without which that safety cannot be guarded. On this principle it is that courts of justice are universally acknowledged to be vested by their very creation, with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates ; and (as a corollary to this proposition) to preserve themselves and their officers from the approach and insults of pollution.

" It is true that the courts of justice of the United States are invested, by express statute provision, with power to fine and imprison for contempt ; but it does not follow from this circumstance that they would not have exercised that power without the aid of the statute ; or not in cases, if such should occur, to which such statute provision may not extend. On the contrary it is a legislative assertion of this right as incidental to a grant of judicial power, and can only be considered as an instance of abundant caution ; or a legislative declaration that the power of punishing

for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment."

The other case is that of *Kearney*, in 1822, (reported also by Mr. Wheaton, vol. 7, p. 38,) in which the Court says, "It is also to be observed that there is no question here but that this commitment was made by a court of competent jurisdiction and in the exercise of an unquestionable authority." The commitment in that case was for a contempt of this Court in refusing to answer a question as a witness.

But it is contended that a contempt of court is a crime; and by the second section of the third article of the Constitution of the United States, the trial of all crimes, except in cases of impeachment, shall be by jury.

The language of the Constitution is said to be universal, with a solitary exception, which proves the universality of the rule as to cases not excepted.

The sixth amendment also declares, "that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury," &c.

This language is absolutely universal, without excepting even the case of impeachment; and there is not in the original Constitution or in the amendments any exception of cases arising in the land or naval forces, or militia, in regard to the right of trial by jury. In such cases the fifth amendment only obliges the parties to answer to accusations for capital or infamous crimes without the previous presentment of a grand jury, but does not deprive them of the right of trial by jury. By the literal construction of the Constitution, all crimes, (except in cases of impeachment,) even those committed in the land and naval service, must be tried by jury; yet, in practice, these are tried by courts-martial, without a jury. But whatever may be the law as to cases arising in the land and naval service, cases of contempt of court have never been considered as crimes within the meaning and intention of the second section of the third article of the Constitution of the United States; nor have attachments for contempt ever been considered as criminal prosecutions within the sixth amendment. From time immemorial the courts of England, and from the first settlement of this country the courts here have claimed and exercised the power to punish contempts in a summary manner. All the courts of the several States, it is believed, were in the full exercise of that power at the time of the formation of the Constitution of the United States. It was a power universally submitted to, because every one saw that it was necessary to the very existence of the courts. If the Court had not power to commit for a contempt until the person should have been con-

Ex parte Burr.

victed by a jury, it would be in the power of the party by a continued interruption of the business of the Court effectually to secure his own impunity; and the power of the Court would be perfectly paralyzed.

Such being the universal practice and sentiment upon the subject, it cannot be supposed that the makers of the Constitution meant to include it in the number of crimes entitled to trial by jury; and that they did not may be fairly argued from the constructive exposition of the clause of the Constitution given by the first Congress which sat under its authority. Many members of the convention were members of the first Congress, and it cannot be believed that they would have silently acquiesced in so palpable a violation of the then recent Constitution, as would have been contained in the seventeenth section of the Judiciary Act of 1789, [1 Stat. at Large, 73,] (which authorizes all the courts of the United States "to punish by fine and imprisonment, at the discretion of the said courts, all contempts of authority in any cause or hearing before the same,") if their construction of the Constitution had been that which has, in this case, been contended for at the bar. When the Judiciary Act was revised in 1801, [2 Stat. at Large, 89,] the same power was given to the courts, and even extended to a single judge; and when the judicial system was amended in 1802, [2 Stat. at Large, 156,] the same power was continued.

The construction which has been thus universally given to the Constitution of the United States, and the acquiescence of the people in that construction compel us to say, that contempts of courts are not crimes within the meaning of the second section of the third article of the Constitution of the United States, and that attachments for contempt are not criminal prosecutions within the meaning of the sixth amendment, so as to entitle the party to a trial by jury; and that the power to punish contempts in a summary manner, as given by the seventeenth section of the Judiciary Act of 1789, [1 Stat. at Large, 73,] to the courts of the United States, is not unconstitutional. The consequences of the want of such a power must be obvious to every reflecting mind. If the laws be not executed, anarchy will be the immediate consequence; and anarchy too often ends in tyranny. If the laws be not respected it will be difficult, if not impossible to execute them. Their due execution depends more upon general sentiment than upon the physical power of the government. The same observation will apply to courts of justice. Their power to enforce their judgments depends more on the continuance and support of the good and virtuous portion of society than upon the power of the executive. In order to obtain that countenance and support they must deserve respect; and that court which may with impunity

Ex parte Burr.

be treated with contempt, will inevitably be contemptible, even in the eyes of the good and the virtuous. Their judgments will not be executed; the law will become a dead letter, and fraud and violence will prevail. It is therefore of the highest importance to the peace and good order of society, that courts of justice should have the power of punishing contempts.

The Court has thought it necessary to make these observations, because the doctrines advanced by the highly respectable and eloquent counsel at the bar, seemed to the Court to be dangerous not only to the peace and good order of society, but to the very existence of personal and civil liberty. It is not the right of the courts only, but it is the right of the people, to cause their courts to be treated with respect. It is the public interest, and not the personal pride of the judges, as suggested at the bar, which claims this power for the courts. As individuals, we claim no more respect than our individual characters deserve; but, as judges of this Court, we should betray our trust, we should become traitors to the people, if we did not claim the respect due to a judicial tribunal, and enforce that claim by all the means which the laws allow. And while the Court has means, consistent with the dignity of such a tribunal, and sanctioned by the uninterrupted usage of ourselves, our predecessors, and ancestors, for more than six hundred years it will not condescend to personal conflict with any person who may contemn its authority.¹

The Court, being entirely satisfied of its power to investigate the conduct of its officers, in the mode adopted in the present case, will proceed to consider the facts, which, upon this investigation, have been proved to the satisfaction of the Court, and the judgment which it ought to pronounce.

With regard to the charges, we do not think it important that they should be more specific than may be necessary to give notice of the nature of the evidence intended to be produced, so that the party may not be taken by surprise; and if the Court had, upon the hearing, found that he had been so taken by surprise, as to any of the charges, we should have given him further time, or have acquitted him of such charge.

Without confining ourselves to the allegations upon which this investigation was grounded, we think the following facts appear to be proved:

1. That having, in an accidental conversation with John Golding, answered a question of law put to him by the said Golding

¹ It had been contended by the defendant's counsel, in argument, that the Court has no power to punish a man for contempt in the face of the Court, otherwise than "to throw him out of the window or kick him out of court."

Ex parte Burr.

without the intention of consulting him as a counsellor at law, and without the expectation of being made liable for any fee for the answer which Mr. Burr might give, Mr. Burr employed the said Golding to make two pairs of shoes for him; and when the bill was sent to him for the shoes, Mr. Burr told the messenger that Mr. Golding might sue him as soon as he pleased and he would supersede it. That Mr. Golding did sue him before a justice of the peace; and that Mr. Burr, with intent to avoid the payment of the debt, made out an account against the said Golding, charging him five dollars for advice in the matter aforesaid, and having sworn to it, claimed it as a set-off, before the justice who gave judgment against Golding; from which judgment he appealed to this Court, where the judgment was reversed.

2. We find that General Van Ness leased a lot of land in this city to Patrick Nicholson, who, being in jail for debt, and about to apply for a discharge under the Insolvent Act, and Mr. Burr being his counsel and attorney, proposed, by the advice of Mr. Burr, to surrender the lease to General Van Ness, to whom he was indebted for rent. That this was done and the lease given up, with an understanding, but not an absolute engagement on the part of General Van Ness, that if he realized from the property more than what was due to him, he would give the surplus to the wife and children of Nicholson. That Caulfield, the tenant under Nicholson, acknowledged himself tenant to General Van Ness; that Mr. Burr, at the time assured General Van Ness, that the surrender of the lease was good and valid, and that the property now belonged to him in justice, in law, and in equity.

That when Nicholson appeared before the judge to be discharged, Mr. Burr was his counsel and attorney; and declared, before the judge and the creditors, that the lease had been surrendered, and that Nicholson had no right or interest in the lot. That the judge, however, at the instance of the creditors, required that Nicholson's interest in the lot should be inserted in the schedule; which was done, and Nicholson was discharged. That the trustee advertised for sale all Nicholson's right in the lot; that General Van Ness attended and forbade the sale, and told Mr. Burr that the property was entirely his, (Van Ness's.) and that he (Burr) knew it. Notwithstanding which Mr. Burr purchased Nicholson's right for six dollars, and forbade the tenant to pay the rent to General Van Ness, but claimed it for his own use; and as often as General Van Ness distrained for the rent, the tenant, by Mr. Burr's advice, replevied the distress; in one of which actions of replevin, if not in all, Mr. Burr was his attorney. That Mr. Burr himself also distrained, and gratuitously filed a bill in chancery in the name of the tenant against himself

Ex parte Burr.

and General Van Ness, praying that both parties might be enjoined from distraining until the adverse claims of himself and General Van Ness, to the rent, should be decided.

3. We find that a certain Mr. Moulten had rented a house of Thady Hogan, and that when a quarter's rent was about to become due, the goods of Moulten were clandestinely removed from the premises; and that, on the same day, Mr. Burr took a bill of sale of them and claimed them as his own; and when they were distrained by Hogan, replevied them in his own name.

4. We find that Mr. Burr, being the attorney of Patrick Nicholson, and Joseph Johnson being a creditor of the said Nicholson, Mr. Burr, upon the promise of Johnson to give him one half of the amount of his claim, which was upwards of \$20, if he would tell him how he should get his money, told Johnson that if he would levy his execution upon certain property, he would get it; but directed him not to let Nicholson know that he had given him this information. That Johnson got only nine dollars of his claim. That Mr. Burr afterwards demanded of Johnson his fee; telling him that he lost his money by not levying his execution on a mare claimed by Mr. Carbery. That after Nicholson had run away, when Johnson attempted to levy his execution upon Nicholson's goods, he was forbidden to do so by Mr. Burr, who claimed the whole by virtue of mortgage given by Nicholson to secure the fees due by him to Mr. Burr as his counsel. That the consideration stated in the mortgage was \$50. That Mr. Burr offered to take \$20 or \$25 rather than go to law or have trouble about it; and that his claim was about \$30.

As we understand that suits are depending in which a jury is to pass upon the moral complexion of the facts stated in these three last cases, namely, those of General Van Ness, Thady Hogan, and Joseph Johnson, we shall, at present, draw no inferences from them.

5. We find that Mr. Burr, being counsel for Robert Hoge, who was imprisoned upon a charge of murder, sent for some of the witnesses for the United States, before the trial, and examined them in his office; and finding that one of them, Robert Gray, was a material witness against the prisoner, he told the witness that it would be better if he would be absent from the trial; and advised him to conceal himself for a few days. That the said witness, having been recognized with surety to appear and testify, his surety (being apprehensive, from circumstances, that the witness was about to run away) brought him into court and surrendered him in discharge of his recognizance.

That while the surety was bringing up the witness to surrender him, Mr. Burr told him that if he was surrendered the

Ex parte Burr.

court would take his own recognizance. That upon his surrender, the court, upon the motion of Mr. Burr, was about to take the witness's own recognizance without surety, one of the judges being of opinion that no witness ought to be imprisoned for want of security for his appearance, unless there was strong reason to apprehend that the witness would run away.

That the Court, being satisfied upon inquiry that there was reason to apprehend that the witness would not appear to testify at the trial, refused to discharge him without security for his appearance; and as the witness was unable to give it he was committed. That the advice so given by Mr. Burr to the witness to absent himself from the trial, was given with the intent to obstruct the due administration of justice, and in violation of his oath as an attorney of this Court.

6. We find that Mr. Burr, being the counsel of John Free, who was indicted for the murder of his wife, and while the said Free was in prison upon that charge, executed an instrument of writing to Mr. Burr, and acknowledged it before two justices of the peace in the manner in which deeds for land are required by law to be acknowledged. During the investigation of that matter before the Court upon the present inquiry, Mr. Burr admitted that he had received from Free a power of attorney to take possession of his property to preserve it, that it might not be destroyed or wasted by his children during his imprisonment: and Mr. Burr's language left the court under the impression that that power of attorney was the only instrument that Free had executed to him, and was the same which had been acknowledged before the two justices. He stated that finding, upon inquiry, that the property remained much in the same condition in which it was left by Free, he had not taken possession of the property, and had thrown by the power of attorney, and did not know whether he could find it. The Court expressed a strong wish to see the instrument which had been acknowledged by Free before the two magistrates, as it might remove any unfavorable impression which might be made upon their minds by its suppression. Mr. Burr did not, at that time, say that he had destroyed it: nor did he intimate that it was a deed given by Free to him to enable him to indemnify Free's bail, if Free should be admitted to bail. Some days afterwards Mr. Burr produced to the Court a power of attorney from Free to him, authorizing him to take charge of his personal estate and papers, and stated to the Court that it was the power, of which so much had been said. But it was not acknowledged before the two justices. Mr. Burr then, for the first time, admitted that the instrument, which had been so acknowledged, was a deed from Free to him conveying all

Ex parte Burr.

his property ; but stated that its only object was to enable him to indemnify the bail of Free, in case he should be admitted to bail ; that afterward finding, upon inquiry of Mr. Bussard, that Free could not be bailed, he had destroyed the deed.

7. Since the investigation which took place upon the present subject of inquiry, a transaction has occurred which ought not to be passed over by the Court.

In the year 1819, one Simon Meade died largely indebted, and leaving a considerable real estate, which, together with his personal estate, was, at the time of his death, supposed to be more than sufficient to pay all his debts. The personal estate alone was insufficient ; and Mr. Griffith Coombe and other creditors brought a suit in chancery against the widow and heirs of Mr. Meade to charge the real estate with the deficiency of personal assets. This bill was answered by Mrs. Meade in her own right, and also as guardian of her infant children. Her answers were sworn to by her ; one of them before Mr. Overton Carr, a commissioner appointed by the Court for that purpose, and the other, first before Mr. Forrest, and afterwards, the answer having been, on the same day, amended, it was sworn to by her again before Mr. Varnum. The Court decreed a sale. The property was sold by Mr. Joseph Forrest, the trustee appointed by the decree, and who also holds the office of auditor of this Court, an office analogous to that of a master in chancery.

Two public sales were made ; at both of which Mrs. Meade attended personally and purchased a house and lot, which she afterwards sold to a profit. By her answer she had agreed, that her right of dower should also be sold, and agreed to take a proportion of the proceeds of sale in lieu of her dower. Since the sales she has often applied to the trustee to receive her proportion of the proceeds, which has not yet been paid to her because the sales have not been ratified by the Court, and because she has not accounted for the personal estate of which she was the administratrix.

On a motion to this Court on Friday last, (June 20, 1823,) by the solicitor of the creditors for a ratification of the sale, Mr. Burr, to show cause against its ratification, produced and read to the Court the affidavit of the same Mrs. Meade, in which she states, " that she has never heretofore given her authority as such administratrix to any person whatever ; nor has she ever disposed of, parted with, or sold her right of dower to the estate of the said Simon Meade nor any part thereof ; nor has she ever ordered any suit in chancery to settle the same ; nor has she ever consented or known of any suit in chancery to settle the same ; nor has she ever consented or known of any suit in chancery

Ex parte Burr.

commenced by her for the recovery of any property or demand whatsoever from any person or persons ; nor has she ever known of any suit being commenced against her as administratrix, or in any other way or manner whatever ; except, she says, she has lately understood from divers persons that a suit in chancery had been commenced against her and the heirs of the said Simon, but she does not know for what reason the same was commenced, if the same is true ; and that she has never, with her consent and knowledge, become a party to any suit in chancery either in her own right or as administratrix or any other way, capacity, or manner since the death of her said husband ; nor has she since that period, made answer to any bill in chancery in any capacity or situation whatever, nor has she by consent or knowledge made any answer of any kind whatever, by attorney or otherwise ; nor has she authorized any person to be interested for her as a party to any such suit ; nor has she signed her name to any paper signifying the same, to her knowledge ; nor has any person for her so done by her authority or approbation."

These allegations being so inconsistent with the record, the Court could not but perceive that they were false, and that imposition had been practised upon Mrs. Meade by some person. It was therefore deemed necessary to investigate the subject more fully ; and upon that investigation the Court is strongly impressed with the belief that several of the most material allegations in the affidavit are not true, and that Mrs. Meade is in danger of the penalties of perjury.

It appeared that the affidavit had been drawn by Mr. Burr at the request of Mrs. Meade, who furnished him with a written statement of facts from which, in part, the affidavit was to be drawn ; that it was drawn nearly a month before it was sworn to ; that Mrs. Meade had employed Mr. Burr as her solicitor to investigate the matter ; that Mr. Burr, before the affidavit was sworn to, if not before it was drawn, had examined the record and the papers filed in this cause, and was apprised of all the proceedings ; and did not warn Mrs. Meade of the danger she was in of committing perjury if she swore to the affidavit in the positive terms in which it was drawn.

In this respect, the Court thinks Mr. Burr was, to say the least, extremely negligent of his duty as counsel ; especially as Mrs. Meade appears to be but little conversant with legal proceedings ; and as the facts stated by her, if true, implicate materially the characters of several persons of great respectability.

In support of his general character, Mr. Burr has produced to the Court a considerable number of letters addressed by gentlemen of high standing in society, to the executive, speaking in

Ex parte Burr.

very favorable, and some of them in warm, terms of his services, bravery, and good conduct as an officer during the late war. He also produced testimony of his general good character previous to his admission to this bar. In conformity with a rule of this Court which existed on the 11th day of April, 1822, when Mr. Burr was admitted to this bar, but which was shortly afterwards rescinded, a person who had been admitted to practise in the supreme, or superior court of any of the States, was permitted to practise as an attorney of this Court, upon his producing satisfactory evidence of his good moral character, without a personal examination as to his knowledge of the law. Under this rule Mr. Burr was admitted to the bar, upon his producing a certificate of his having been admitted to practise in the Supreme Court of New York.

Upon these facts, the COURT has, with the utmost anxiety, deliberated upon the judgment which it ought to give. It is a case in which it is about to exercise one of its discretionary powers; and it is sensible that it is bound by the rules of a sound and legal discretion.

On the one hand, it considers that Mr. Burr has served his country with reputation, has fought and bled in her defence, and has been discharged from her service with honor.

On the other hand, it is the duty of the Court to see that the members of the bar maintain the purity of character of that profession which, Lord Mansfield has justly said, should be free from all suspicion. It is bound to discountenance and punish every direct attempt, by any of its officers, to obstruct the due administration of justice; and there are, standing at this bar, gentlemen of high and honorable character for legal science, and for moral and professional integrity, to whom we should do injustice if we compelled them to associate with men of an opposite character.

If there were no other charge against Mr. Burr, than that of an attempt to practise upon the witnesses for the United States in a criminal prosecution, we should think it evinced such a destitution of moral sense, such an ignorance, at least, of the first duties of an attorney and counsellor of this Court, and such a disregard of the oath which he had so recently taken, as to deserve severe reprehension.

But when we consider the other facts which are in proof before us, tending to show that the instance which we have already noticed, was not the effect of transient inadvertence, the Court will order that Levi L. Burr be suspended from practising as an attorney in this Court, for the term of one year, and until the further order of the Court. And as it is probable that a jury will pass upon the cases which we have mentioned, the Court will

Goldsborough v. McWilliams.

refrain from giving any opinion, whether Mr. Burr shall be ultimately excluded from the bar, until those cases shall have been decided.

NOTE. Mr. Burr, at February term, 1824, applied to the Supreme Court of the United States, for a *mandamus* to this Court, to restore him to his office of attorney. But the motion was overruled. 9 Wheat. 529.

HOLMES v. BUSSARD.

A *supersedeas* judgment must recite the original judgment correctly.

MOTION by *Mr. Taney* and *Mr. Redin*, for the defendant, to quash a *supersedeas*, and an execution issued upon the *supersedeas*, because it stated the original judgment to be for \$700 and costs, whereas the original judgment was for \$1500, to be released on the payment of \$700 and costs.

Mr. Marbury, for the plaintiff.

The COURT (*THRUSTON*, J., absent,) quashed the execution and the *supersedeas*.

C. W. GOLDSBOROUGH v. CLEMENT McWILLIAMS.

An award, signed by J. Mechlin and John P. Ingle, as an award made in pursuance of a reference to them, will not support an averment of an award or umpirage made by the said John P. Ingle as umpire, upon the failure of the two original arbitrators, J. Mechlin and Charles L. Nevitt, to deliver their award within the time limited by the bond.

An award not delivered within the time prescribed by the arbitration-bond is not valid.

When the time for delivering an award is limited by the arbitration-bond, parol evidence cannot be received to show an extension of the time.

One partner cannot maintain an action at law against the other partner upon a partnership transaction, unless for a balance struck, with a promise to pay.

ASSUMPSIT for not performing an award, and for use and occupation of a brick-yard, with the common money counts. The condition of the arbitration bond was to "stand to, observe, and fulfil the award, order, arbitrament, final end, and determination of Charles Nevitt and Joseph Mechlin," &c., "so as the award of the said arbitrators be made and set down in writing under their hands and seals, ready to be delivered to the said parties in difference on or before the first day of August next (1819) ensuing the date hereof; and if the said arbitrators shall not make such their

award of and concerning the premises within the time limited as aforesaid, then if the said Clement McWilliams, his heirs," &c., "shall well and truly stand to, observe, perform, and fulfil, and keep, the award, determination, and umpirage of John P. Ingle, being a person indifferently named and chosen between the said parties for umpire; so the said umpire do make and set down his award and umpirage in writing, under his hand and seal, ready to be delivered to the said parties in difference, on or before the first day of August next ensuing the date hereof, then this obligation to be void," &c.; dated the 21st July, 1819.

The first count in the declaration, which was the only count upon the award, avers that the parties before the 1st of August, 1819, agreed to extend the time beyond that day, "and to give further time to the said arbitrators or umpire, as the case might be, until the day of , in the year , to make, set down in writing, and deliver the award or umpirage, as the case might be;" and that the defendant promised "to abide by, keep, and perform his part of the award or umpirage, as the case might be, which might or should be made as aforesaid, at or before the expiration of the time last mentioned." That the arbitrators, Nevitt and Mechlin, never made any award in the premises, nor did the said umpire, John P. Ingle, on or before the said 1st day of August, make any award or umpirage; but afterwards, on the 5th of August, 1819, he "made his award or umpirage in the premises in writing, under his hand and seal, and delivered the same in two parts, or duplicate, one to each of the parties in this cause," and thereby awarded the defendant to pay the plaintiff \$419, &c.

The award produced and offered in evidence by the plaintiff, was dated the 5th of August, 1819, and was under the hands and seals of J. Mechlin and John P. Ingle, and recited that the matters in difference had been submitted to them; and then says, "Now know ye, that we the subscribers having fully examined and duly considered the proofs and allegations of the said parties, do award as follows," &c. It says nothing of the umpirage of John P. Ingle, but proceeds as if he and J. Mechlin were the original and only arbitrators appointed by the parties, not mentioning the name of Charles L. Nevitt.

Mr. Key and *Mr. Ashton*, for the defendant, objected to the award as evidence in this cause, because it was neither an award by the original referees, nor by the umpire as such.

Mr. Lear and *Mr. Jones* contended that it was, in substance, an umpirage made by the umpire, and was not the worse for being made with the consent of one of the original arbitrators.

But the COURT (*Thurston*, J., absent,) decided, that the award

Goldsborough v. McWilliams.

did not support the averment of an unpirage by J. P. Ingle, and rejected it as inadmissible evidence. The Court also refused to receive parol evidence of an agreement to extend the time limited by the bond for the delivery of the award.

Mr. Lear, for the plaintiff, objected to the reading of a deposition, because, in the caption, this Court is called the Circuit Court of the United States for the County of Washington in the District of Columbia, whereas the style of this Court is, the Circuit Court of the District of Columbia for the County of Washington.

But the COURT overruled the objection.

The COURT, at the prayer of the defendant's counsel, instructed the jury that, if they should be satisfied by the evidence, that a partnership existed between the plaintiff and the defendant in regard to the transactions upon which this action is founded, the plaintiff cannot recover unless a balance was struck by the parties, and the defendant promised to pay it; and that the articles of agreement read in evidence, were evidence of such a partnership.

Verdict for the defendant.

Motion, by the plaintiff's counsel, for a new trial, on the ground of error in law in the opinions and instructions of the Court.

At October term, 1823, the motion came on to be heard, and the point principally urged was, that the articles of agreement, read in evidence, were not evidence of a partnership in the brick-making business.

By these articles, the plaintiff rents to the defendant, certain brickkilns, sheds, and yards, and his right to clay, and one half of his right to use a certain patented machine for making front bricks. Each party was to furnish an equal quantity of tools, implements, and labor, and to pay for one half of improvements to the kilns, sheds, &c. The defendant was to work the yard to every advantage, with eight gangs; to pay the plaintiff \$200, for one half of his right to use the patented machine; to keep an accurate account, with vouchers, of all expenses, and of all bricks sold, and to pay the plaintiff, as rent for the kilns, sheds, &c., one half of the net profits resulting from the brick-making business, to be paid from time to time out of the sales of bricks, and to be charged to him, and brought into the ultimate settlement of each year's business; which settlements were to be made on the 20th of December of each year. The agreement was to continue as long as the plaintiff should have a right to work the clay, under his agreement with the Corporation of Washington, but either party might withdraw at the end of any year.

To show that these articles did not constitute a partnership in the brick-making business, *Mr. Lear*, for the plaintiff, cited

Ex parte Minor.

Hesketh v. Blanchard, 4 East, 144; and *Hoare v. Dawes*, Doug. 371.

But the COURT (THRUSTON, J., absent,) was still of opinion that the articles constituted a partnership between the plaintiff and defendant, and overruled the motion for a new trial.

Judgment for the defendant.

Ex parte THOMAS JEFFERSON MINOR.

A justice of the peace in Alexandria county has no power to issue a *capias ad respondendum*, or warrant of arrest, for a small debt, before judgment.

UPON the return of the *habeas corpus* directed to Leonard Adams, a constable of the county of Alexandria, it appeared that Mr. Minor was in his custody under a warrant of arrest, or *capias ad respondendum*, issued by Adam Lynn, Esq., a justice of the peace of that county, directed to the said Leonard Adams, commanding him to take into his custody the body of the said Thomas J. Minor, and him safely keep, so that he should have him before him or some other justice of the peace for that county, on the 5th day of June, 1823, to answer to Broders, Evans, & Co. in a plea of trespass on the case for one dollar due by account. This precept was dated the 5th of June, 1823.

By the Act of Congress of the 27th of February, 1801, [2 Stat. at Large, 103,] the laws of Virginia were continued in force in the county of Alexandria, as they then existed; and it was enacted that the justices of the peace, to be appointed under that act, should, in all matters civil and criminal, have all the powers vested in, and should perform all the duties required of, justices of the peace as individual magistrates, by the laws thus continued in force therein; and should have cognizance of personal demands to the value of twenty dollars, exclusive of costs. By the Act of the Assembly of Virginia of the 16th of January, 1801, the justices of the peace, as individual magistrates, were forbidden to issue even an execution against the body of the debtor, and *a fortiori*, a *capias ad respondendum*. This law was one of the adopted laws under the Act of Congress of the 27th of February, 1801, [2 Stat. at Large, 103,] and continued in force in the county of Alexandria until the Act of Congress of the 1st of March, 1823, [3 Stat. at Large, 743,] extending the jurisdiction of the justices of the peace in the recovery of debts to the amount of fifty dollars, which they are "to try, hear, and determine," and "to give judgment" "in the same manner, and under the same rules and regulations, to all intents and purposes," as they were then "au-

Negro Gardner v. Simpson.

thorized and empowered to do when the debt and damages did not exceed the sum of twenty dollars, exclusive of costs." This Act of March 1, 1823, does not designate the process by which the defendant is to be brought before the magistrate, but leaves it as it was before.

The COURT, upon this view of the case, ordered Mr. Minor to be discharged from the custody of the constable.

UNITED STATES v. DAVID BATES.

A person who has given a receipt for goods to be delivered to other persons, is a competent witness for the United States, upon a prosecution against another person for stealing the goods.

In all criminal prosecutions the Attorney for the United States, upon the general issue, has a right to close the argument before the jury.

INDICTMENT for stealing a box of books.

Mr. Handy was offered as a witness for the United States.

Mr. Morfit and Mr. Ashton, for the prisoner, objected that he was interested, as he had given a receipt for the books to B. French, stating them to be so many, more or less, to be delivered to sundry persons. They compared it to the case of forgery, where the person whose name is forged is not permitted to testify; and to the case of usury, where the debtor is not a competent witness until he has paid the debt.

But the COURT (*nem. con.*) overruled the objection.

Mr. Morfit, after closing his argument to the jury, contended that the Attorney for the United States should not be permitted to reply, inasmuch as the prisoner had not called any witness on his part, but relied on the defect of evidence on the part of the United States. *The King v. Lord Abington*, 1 Esp. Rep. 227.

But the COURT (*nem. con.*) said that, however the practice might be in England, in this Court the attorney for the United States has always had the right, in criminal prosecutions, to close the argument before the jury, upon the general issue.

Verdict, guilty. Pardoned by the President of the United States.

NEGRO VINCENT GARDNER v. THOMPSON SIMPSON.

A Virginian slave is not entitled to freedom, under the Maryland Act of 1796, c. 67, by being hired to a resident of the county of Washington for a limited period.

PETITION FOR FREEDOM. Upon the trial, the petitioner's counsel took a bill of exceptions, which stated that he offered evidence to

McSherry v. Queen et al.

prove that the petitioner was residing in the city of Washington previous to Christmas, 1821, and continued so to reside till the end of the year 1822. That the defendant was a citizen and resident of Virginia, and knew that the petitioner was so residing in Washington, and made no objection to his so residing.

That the defendant offered evidence to prove that the petitioner was his slave, born in Virginia, and that he hired the petitioner to the petitioner's father, Tom Gardner, for the year 1821, who then lived in Virginia. And that in 1822, he hired him to one Barnes, for the petitioner's father, not knowing that the father was about to remove into the county of Washington in the District of Columbia, which he did in December, 1821, taking the petitioner with him, where he remained until the 22d of December, 1822, and was at the defendant's house in Virginia, on the 25th of the same month. That the petitioner afterwards returned to Washington, and did not return to the defendant at the expiration of the year, but remained in Washington, and claimed his freedom in consequence of such removal to Washington :

Whereupon, the Court, at the prayer of the defendant's counsel, instructed the jury, that if they should be satisfied by the evidence, that the importation of the petitioner into the county of Washington was with the intent that he should be hired to remain for a limited time only, and not permanently, it was not such an importation as is within the first section of the Act of Maryland of 1796, c. 67. Verdict for the defendant.

A bill of exceptions was signed and a writ of error taken out, but not prosecuted.

DENNIS McSHERRY v. R. T. QUEEN, CH. J. QUEEN, & JAMES KING & Co.

The Court will, on motion, quash an execution upon a *supersedeas* judgment, and also the *supersedeas* judgment itself, if it does not truly recite the original judgment.

Mr. Wallach, for the defendants, moved the Court to quash an execution issued upon *supersedeas* ; and also the *supersedeas* itself, because it did not truly recite the original judgment. The original judgment was for \$200 damages, to be released on the payment of \$100 with interest from the 13th of April, 1820. A payment of \$50 is noted on the docket.

The *supersedeas* stated the debt to be \$50, taking no notice of the damages to be released on the payment of a smaller sum.

The COURT (THRUSTON, J., absent,) quashed the execution and *supersedeas*, because the original judgment was not truly recited in the *supersedeas* judgment, and because a judgment against James King & Co. was too uncertain.

BLAGROVE v. RINGGOLD.

After the term in which a judgment has been entered, and the costs taxed, the Court will not open the judgment to allow the cost of taking a deposition in New York.

AFTER the expiration of the term in which the judgment was entered, *Mr. Burr* moved the Court to allow the cost of taking a deposition, in New York, to be taxed.

The COURT (THRUSTON, J., absent,) overruled the motion.

WILLIAMSON v. BRYAN.

When an action of replevin has been discontinued by the non-appearance of either party, the Court will not, at a subsequent term, reinstate the cause, unless it appears to be the default of the clerk that the appearance was not entered.

REPLEVIN. This cause had been discontinued at the last term, because the defendant had not appeared.

Mr. Dawson, the defendant's counsel, made affidavit that he was desired by the defendant, before the last term, to enter his appearance for the defendant in all his causes, and thought he had done so; but now finds that his appearance was not entered in this case, and that the cause was discontinued for want of an appearance. Whereupon he moved the Court to direct the cause to be reinstated, and brought forward upon the docket, and the continuance entered.

But the COURT (THRUSTON, J., absent,) said that the only cases, in which they had granted such a request, were those in which it appeared to be the default of the clerk that the appearance had not been entered.

Motion overruled.

FRERE v. MUDD.

An insolvent debtor, arrested for a debt due before his discharge, can only be relieved by the Court, or a judge of the Court, before whom the process is returnable.

A WRIT of *habeas corpus* was issued to bring up the body of Mudd, who was arrested on a *ca. sa.* issued by a justice of the peace for a debt under \$50. It was suggested, upon the return, that all the debt except \$8 was due before his discharge under the Insolvent Act, and the Court was now moved, under the tenth section of the act, to discharge him upon his paying the \$8 and interest and costs. The execution was, under the Act of Congress

 Clarke et al. v. Threlkeld.

of the last session, [1st March, 1823,] returnable before the justice, [3 Stat. at Large, 743.]

The Court (*nem. con.*) refused to discharge him, because, by that section of the act, the power to discharge, in such cases, is given only to the Court, or a judge of the Court, to whom the execution is returnable.

CLARKE *et al.* v. THRELKELD.

A cause in equity, in this Court, may be reheard if the petition for rehearing be filed before the end of the next term after the final decree, and if no appeal lies to the Supreme Court in that cause.

THIS was a bill filed against Mr. Threlkeld, and others, to obtain the conveyance of a lot in Georgetown, to the complainants, in consequence of the deed, formerly made by Mr. Threlkeld to the ancestor of the complainants, of the same lot, having been lost before it was recorded. Mr. Threlkeld had no interest in the cause, and did not oppose the prayer of the bill.

At June term, 1822, the Court decreed that he should convey the lot to the complainants, and pay the costs. At the next term (October term, 1822.) *Mr. Toney* for the defendant, contended that the decree ought not to have been for costs.

Mr. Key, contra, waived the formality of a petition for rehearing, and now, at this term (April term, 1823,) consented that the Court should consider the case as if the petition had been filed at October term, 1822. By the 31st rule of the equity practice of the courts of the United States, as prescribed by the Supreme Court, it is declared, that if no appeal lies to the Supreme Court, a rehearing may be granted, at the discretion of the Court, at any time before the end of the next term after the final decree shall have been entered and recorded.

The value of the lot decreed to be conveyed does not appear in the papers in the cause, but was supposed to be of less value than \$1000, so that it was a cause in which there could be no appeal to the Supreme Court.

The Court, under these circumstances, was of opinion (*MORSELL, J., contra*,) that they had now a right to rehear the cause; and upon the rehearing, they ordered so much of the decree to be rescinded as regarded costs.

CIRCUIT COURT OF THE UNITED STATES.

MAY TERM, 1823, AT ALEXANDRIA.

UNITED STATES *v.* DAVID DICK, JR.

In cases of bastardy this Court has no jurisdiction, unless upon complaint of the overseers of the poor of the county.

A CASE of bastardy.

Mr. Taylor, for the defendant, contended that no proceeding can be instituted against the reputed father of a bastard child but on application by the overseers of the poor of the county, or of one of them. *Virginia Law*, 26th December, 1792, § 23. But the application, in this case, was made by Jonathan Swift, who was a trustee of the poor of the town, under a by-law of the corporation of Alexandria.

Mr. Swann, contra. That relates only to the manner of bringing the party before the Court, but being now before the Court, it has authority to make an order for the support of the child, and to indemnify the county.

The COURT (THRUSTON, J., absent,) said that they had no jurisdiction. That in order to give this Court jurisdiction, the application must be made by an overseer of the poor of the county.

UNITED STATES *v.* GREENBERRY THOMPSON.

A signature, in black lead pencil, of a warrant, by a justice of the peace, is not a sufficient signature in law.

If a warrant contains, on its face, a cause of arrest within the jurisdiction of the magistrate, and purports to have been issued within his local jurisdiction, and is, in other respects formal, the officer is bound to execute it, and resistance is unlawful, although, in fact, the offence was not committed within the local jurisdiction of the magistrate.

INDICTMENT, for assault and battery on Leonard Adams, a constable, who came to the assistance of R. Stevens, a constable, to take the defendant upon a warrant from N. S. Wise, a justice of the peace for this county, upon a charge upon the oath of

Samuel Thompson, of having violently beaten negro Griffin, the slave of Jonah Thompson. The warrant was signed with a black lead pencil.

Mr. Taylor, for the defendant, contended that the warrant was void, and did not justify the arrest, because the justice does not state that he acted within this county; because the county is not named in the warrant; nor does it state that the offence was committed in this county; nor that N. S. Wise is a justice of the peace; and because it was not signed by the justice, and *Mr. Wise* himself states that he omitted to take the oath of the complainant. The beating was proved, in fact, to have been in Virginia. The authority and the jurisdiction must appear upon the face of the warrant.

The COURT (*THRUSTON, J.*, absent,) instructed the jury that the warrant was void because not signed by the justice; the signature in pencil not being deemed by the Court a signature, because it is liable to be so easily obliterated.

But the Court said that if a warrant contains on its face a cause of arrest within the jurisdiction of the magistrate, and purports to have been issued within his local jurisdiction, and is, in other respects, formal, the officer is bound to execute it, and resistance is unlawful; although, in fact, the offence was not committed within the local jurisdiction of the magistrate.

UNITED STATES v. JOHN MASON.

If a man steals goods in North Carolina and brings them here, he is guilty of larceny here.

A dead man cannot be the owner of goods. It is not sufficient to state them to be the goods of one A. B. deceased.

INDICTMENT for stealing a pair of golden suspender buckles and a brass pistol "of the goods and chattels of one Edward Rumney, deceased."

Edward Rumney was master of a vessel wrecked on the coast of North Carolina. The prisoner was one of the mariners. Rumney was drowned. There was evidence that the articles belonged to Rumney, and were found on the prisoner, who had offered them for sale, and had given contradictory accounts of the manner in which he obtained them, and claimed them as his own.

Mr. Hewitt, for the prisoner, contended that although he might have stolen them in North Carolina, it was not larceny here.

But the COURT (*THRUSTON, J.*, absent,) stopped *Mr. Hewitt* in

Farmers Bank of Alexandria v. Lloyd.

his argument, and said it had been often decided by this Court, that if a larceny be committed in any of the States, and the thief bring the stolen goods into this district, he is guilty of larceny here. *United States v. Frank Tolson*, (1 Cranch, C. C. 269,) at December term, 1805.

Mr. Hewitt, in argument to the jury, contended that larceny cannot be committed unless of the property of some person in existence. The property, if taken by the prisoner, was taken after the death of Captain Rumney, and no administration has yet been granted upon his estate. The buckles and pistol were not the property of any person at the time they were taken; so that no larceny of them could have been committed, even if taken with a felonious intent. But he had a right to take possession of the goods. There is no evidence that he knew they belonged to Captain Rumney.

Mr. Swann, contrà. The law here differs from that of England in relation to testamentary affairs. There the ordinary grants letters of administration, and until they are granted the goods are to be called the goods of the ordinary. Here the letters of administration are granted by the courts; and if this indictment should be adjudged bad, he should send up another, charging the goods as of the goods and chattels of the Orphans' Court.

After the jury had retired, they came in and asked the Court to instruct them, whether the indictment could be supported for larceny of the goods of a dead man.

The COURT, (THRUSTON, J., absent,) answered, that a dead man could not have goods and chattels; and that therefore, the indictment could not be supported.

FARMERS BANK OF ALEXANDRIA v. EDWARD LLOYD.

If a note varies substantially from that described in the declaration it cannot be given in evidence upon a writ of inquiry.

ASSUMPSIT, against the indorser of a promissory note. The note offered in evidence upon the writ of inquiry was made "payable at the Farmers Bank of Alexandria."

The declaration did not state it as a note so payable.

The COURT (*nem. con.*) said that the note could not be given in evidence upon that declaration.

The jury found one cent damages.

Mr. Fendall and *Mr. Swann*, for the plaintiffs.

Mr. Hewitt, for the defendant.

 Negro Fanny v. Kell.

UNITED STATES v. NEGRO RANDALL.

After the jury is sworn, in a capital case, and the cause has been opened, the Court cannot, without the prisoner's consent, discharge a juror, at his own request.

INDICTMENT, for a rape on Maria Schoals.

After the jury was sworn, and the Attorney for the United States had advanced considerably in opening the case, John Morgan, a quaker, one of the jurors, asked the Court to excuse him from serving on the jury in this case, as he could not, consistently with his feelings, serve in a case of life and death.

The COURT (THRUSTON, J., absent,) said they could not now excuse the juror, without the consent of the prisoner ; which was not given ; and the juror was not excused.

 UNITED STATES v. NEGRO ELICK, a Slave.

This Court has no jurisdiction in assault and battery by a slave on a white man ; and will order him to be taken before a justice of the peace to be dealt with according to law.

THIS was an indictment of a slave for an assault and battery upon Henry Shortle, a white man. The jury found him guilty, and assessed the fine at \$23.

The COURT arrested the judgment ; being of opinion that neither the court nor jury could assess a fine or inflict corporal punishment upon a slave, and that an adequate corporal punishment could only be inflicted by a justice of the peace. They therefore ordered the marshal to take the prisoner before N. S. Wise, a justice of the peace, to be dealt with according to law, and that the verdict and this order be certified to the said justice.

 NEGRO FANNY v. ISAAC KELL.

There can be no binding contract between a slave and his master.

The child of a female slave is a slave, although the mother has the promise of the master that she shall be free at the end of a certain term of years.

THIS cause was submitted to the Court upon a case agreed.

The case stated was to the following effect : —

That W. Simms, in the year 1796, purchased Dorcas, the mother of the plaintiff, for a term of years, of one Alexander

Grigsby v. Love.

Smith, who was the owner of the said Dorcas. That Smith voluntarily promised to execute a deed of emancipation for the residue of her life. Dorcas was put into the possession of the said W. Simms; but the deed of emancipation was, from inadvertence, neglected to be executed. After holding the said Dorcas some years, Simms sold his right to her for that portion of the term then unexpired, to one Carrington, with whom the said Dorcas served out her term, and was then discharged by him as a free woman.

During her servitude with Carrington, she had two children, one of whom, the plaintiff Fanny, is now in the possession of the defendant Isaac Kell, who purchased her of the executors of Carrington, with notice of the rights of the said Fanny.

At November term, 1822, it was agreed by the counsel of the parties that a verdict should be taken for the plaintiff, subject to the opinion of the Court on the said agreed case.

R. J. Taylor, for the plaintiff.

Thompson F. Mason, for the defendant.

At May term, 1824, judgment was rendered for the defendant, upon the case stated; upon the authority of the case of *Negro Joseph v. Wingard*, in Washington, at April term, 1822, [*ante*, 300.]

GRIGSBY v. LOVE *et al.*

In attachments in chancery, under the statute of Virginia, the attaching creditors have priority according to the time of service of their respective attachments.

THERE were six chancery attachments, served at different times, in behalf of several creditors. The question was whether all the attaching creditors shall come in *pari passu*, or whether the attachment first served shall have the preference. The case was at November term, 1821.

Mr. Taylor and *Mr. Mason*, for the first creditor.

The bills do not aver that Love is insolvent. These attachments are all under the statute; and not under the general principles of equity. They do not affect the whole of the debtors' property. By the Act of Assembly of 26 December, 1792, p. 115, the attached effects may be delivered to the plaintiff. To which of these plaintiffs shall they be delivered, if they are to be shared equally by all?

Although in the form of suits in equity, these attachments are, in effect, actions at law, and the plaintiff is entitled to the benefit of his own diligence. Love is merely an absent, not an absconding, or an insolvent debtor. The principle, *pari passu*, applies

only to cases of insolvency, or where the whole funds are before the court, as a court of equity, and are insufficient to pay all. The statute gives jurisdiction to a court of chancery in such cases merely as a mode of getting at the effects. *Wilson v. Koontz*, 7 Cranch, 204.

Mr. Swann, contra, for the subsequent creditors. The statute says that the court may "make such order and decree therein as shall appear just." A just decree would be a decree for equal distribution among all the creditors. The property cannot be delivered over to the plaintiff until the return of the process, and then all the attachments are returned together; and the Court may order the attached effects to be distributed, or to be delivered to the plaintiff or plaintiffs "upon their giving security for the return thereof to such persons and in such manner as the court shall direct."

No reported case in Virginia has decided this question.

The Court continued the case for advisement, and to obtain information as to the practice of the courts in Virginia upon this statute.

At May term, 1822, the case was mentioned again, and the case of *Wright v. Hancock*, 3 Mun. 526, was cited. And now at May term, 1823, *Mr. Taylor* stated to the Court that he was informed by the chancellor in Virginia that the rule *pari passu* does not apply to attachments of this kind; and on the 22d of May, 1823, this Court, so decided. (THRUSTON, J., absent.)

CIRCUIT COURT OF THE UNITED STATES.

OCTOBER TERM, 1823, AT WASHINGTON.

THE Court met on the first Monday of October, and on account of the sickly season, and the ill health of the Chief Judge, adjourned to the first Monday in December.

ADJOURNED COURT, DECEMBER 5, 1823.

JOHN CONNELLY'S CASE.

The allegation filed to deprive a debtor of the benefit of the insolvent act must be specific and certain.

The refusal of a judge to discharge a debtor, if the proceedings were irregular, is no bar to his discharge upon a subsequent application.

All the orders and proceedings must be by the judge to whom the application is made.

JOHN CONNELLY applied to the Hon. J. S. Morsell, one of the judges of this Court, on the 22d of November, 1823, for the benefit of the Insolvent Act of the 3d of March, 1803, [2 Stat. at Large, 237,] and the usual notice was given for the creditors to attend on the first Monday of December, when Michael Murray, one of the creditors of the insolvent, filed allegations under the 7th section of the act, charging,

1. "That the said Connelly was refused heretofore, namely, on the first Monday in October, 1823, by his Honor Judge Thruston, at the suit on *ca. sa.* of said Murray, the benefit of the statute for the relief of insolvent debtors upon proof that the said Connelly had given a preference to one or more of his creditors."

2. "That he hath given a preference to his creditors."

3. "That the said Connelly hath not set out in his schedule a true account of all his real and personal property."

4. "That he has lessened his right to real estate in the county of Montgomery, Maryland, by disposing of the same with the view of defrauding his creditors."

5. "That the said Connelly has not accounted in his schedule for his interest to real property that he is entitled to in the county of Montgomery, Maryland."

6. "That the said Connelly is not now entitled to the benefit of the insolvent law, having been previously refused the benefit of it upon proof before his Honor Judge Thruston that he had sold his real estate, or his right to real estate, in Montgomery, Maryland, with the view of defrauding his creditors, or for the purpose of giving some one or more of them an illegal and undue preference."

Mr. Key, for the debtor, objected to the five last allegations, that they were too vague, and general, and that the debtor ought not to be put to answer them.

As to the first allegation, that the debtor has been denied the benefit of the act upon the former petition, he contended that the proceedings upon that petition were irregular, and that the refusal of the judge to discharge the debtor upon that petition can be no bar to his present application. That petition was addressed to the chief judge; the order for the creditors to appear on the first Monday of October, indorsed upon the petition, is signed in the name of Judge Morsell, and Judge Thruston himself attended on the first Monday in October and heard the case, and refused to discharge the debtor. By the insolvent act no judge has jurisdiction of the case but the judge to whom the application by petition in writing is made. Here the petition in writing was addressed to the chief judge, and no order could be lawfully made upon it but by him, or in his name; yet the order appointing the day for the debtor's discharge and for the meeting of the creditors, was made in the name of Judge Morsell; and Judge Thruston himself attended and took cognizance of the case, and refused the discharge. Besides it does not appear that the allegations were tried either upon interrogatories, or an issue, and no judgment unless upon such a trial, can be a bar to relief under the act. The words of the law are, "and if upon the answer to the said interrogatories, or upon the trial of the issue or issues such debtor shall be found guilty," &c., "he shall be precluded from any benefit under this act." The interrogatories or the issue must be "touching the substance of the said allegations;" and the only allegations which, if true, can deprive the debtor of the benefit of the act, are 1st, "That he had, at the time of his application, conveyed, lessened, or disposed of any part of his property, rights, or credits, with intent to defraud his creditors;" or 2d, "had, within 12 months," &c., "lost by gaming more than \$300;" or 3d, "had assigned or conveyed any part of his property, rights, or credits, with intent to give a preference to any creditor or creditors, or any surety." The allegations filed in that case, were only two. 1st, "that the said John Connelly has embezzled and concealed certain real estate, the

Read v. Carbery.

property of the said Connelly, and also has been guilty of fraud and perjury in the rendition of his schedule, and the oath annexed to the same;" and 2d, "that the said Connelly did give preference to one of his creditors after he considered himself insolvent." The "specification," of the first allegation is, that at the time of his making oath to his schedule he possessed real estate in Montgomery county in Maryland of the value of \$400, not included in his schedule; and the "specification" of the second allegation is, that on or about the 4th of October instant, and subsequently to his application for the benefit of the act, and the filing of his petition and schedule, the said Connelly did convey the Montgomery land to Michael Connelly, one of his creditors, and his near relative, in satisfaction of the debt which he owed him; thereby giving a preference to one of his creditors over the others.

The absolute payment of a debt due to one of the creditors of an insolvent, has never been understood as being such an assignment of property with intent to give a preference to a creditor or surety, as is prohibited by the act; so that neither of the two allegations, if proved, was sufficient, in law, to deprive the debtor of its benefit.

Mr. Fleet Smith, for the creditor, however, still contended that the decision of the judge, that the debtor was not entitled to his discharge, was conclusive, and forever barred him from the benefit of the act.

But the Court was of opinion that the five last allegations now filed, were too vague and immaterial to deprive the debtor of the benefit of the act, if proved; and that the judgment of the judge who refused to discharge him, was not a conclusive bar to his present application for relief.

L. & D. READ v. THOMAS CARBERY.

If payment of a note be demanded and refused on the third day of grace, notice to the indorser, on the next day, is in due time.

ASSUMPSIT against the indorser of B. G. Orr's promissory note, dated December 15th, 1819, payable four months after date. Payment was demanded of the maker on the 18th of April, 1820, and the protest and notice to the defendant were on the 19th of April.

The verdict was taken, subject to the opinion of the Court, whether the demand and notice were in sufficient time.

At December, 1824, the judgment was rendered for the plaintiffs, according to the verdict.

OWEN & LANGSTRETH v. BLANCHARD, Administrator of Cocking.

If a suit is brought originally against an administrator, and he die *pendente lite*, the administrator *de bonis non* may be compelled to appear to defend the suit.

This suit had been originally brought by the plaintiffs against William Blanchard, administrator of William Cocking. Blanchard died *pendente lite*, and Charles Glover, the administrator *de bonis non*, was summoned to defend the suit, but failed to appear; and Mr. Key, for the plaintiffs, moved for an attachment against Glover to compel his appearance.

Mr. Jones, as *amicus curiæ*, suggested that Glover was not bound to appear. The suit abates by the death of Blanchard, the Maryland Act of 1785, ch. 80 not having provided for the case of the death of an administrator who was the original defendant, and who had not come in *pendente lite*. There is no privity or connection between Blanchard and Glover. If an administrator acknowledge a debt so as to take it out of the statute of limitations, the administrator *de bonis non* is not bound by it. And in regard to costs, the administrator was liable, personally, for the costs, in his time; but if the administrator *de bonis non* comes in, he will be made liable, not only for the costs incurred in his own time, but for those of his predecessor.

Mr. Key stated that the practice of the Courts of Maryland always has been to compel the administrator *de bonis non* to appear, in such a case.

The COURT (*nem. con.*) ordered the attachment.

DENEALE v. YOUNG.

Unless notice of set-off be given before the suit is called for trial, it will not be permitted to be given in evidence, upon *non assumpsit*.

Mr. Key, for the defendant, offered to prove a set-off without notice given before the suit was called for trial.

The plaintiff's counsel objected that it was too late,

And the COURT (*nem. con.*) so decided.

Mr. Fendall and Mr. Lear, for the plaintiff.

Messrs. Key and Dunlop, for the defendant.

NEGRO AMELIA v. F. B. CALDWELL.

A slave carried from Washington, in the District of Columbia, to Virginia, by her

Ballard v. Edmonston.

owner, for a temporary residence only, and brought back to Washington, and there sold to a resident of Washington, does not thereby become entitled to freedom under the Maryland Act of 1796, c. 67.

THIS cause was submitted to the decision of the Court by *Mr. Key*, for the petitioner, and *Mr. Jones*, for the defendant, upon the following case agreed.

"In this case it is admitted that the petitioner was born in the State of Maryland, and became, by marriage, the property of one Henry O. Middleton, who resided in Washington county, in this district, until May, 1820, there keeping the said petitioner in his possession, as his slave. That the said Middleton then removed into the State of Virginia, to reside, and left the said slave in Maryland, with her former master. That on the 7th of December, 1820, the said petitioner was carried by the said Henry O. Middleton, to Fredericksburg, in Virginia, where he then resided, and hath resided ever since, with an agreement and understanding between the said Middleton and the said petitioner, that if she did not like to continue in Fredericksburg she should return and get a master, either in Maryland or the district, as she might choose. That after staying some time in Fredericksburg, the said petitioner became dissatisfied, and expressed her desire to return; in consequence of which, the said Middleton, on the 7th of December, 1821, gave her a pass authorizing her to proceed from Fredericksburg to Washington. That in some few weeks afterwards, the said Middleton came to Washington, where the petitioner then was, and sold her to the defendant.

"It is submitted to the Court to determine, upon this statement, whether, by the law of Maryland, A. D. 1796, c. 67, the petitioner is or is not entitled to her freedom; with the privilege to either party to except to the judgment of the Court.

F. S. Key, for petitioner.

W. Jones, for defendant.

THE COURT were of opinion that, upon the facts, as admitted above, the petitioner is not entitled, by law, to her freedom, and therefore give judgment for the defendant. "From which the petitioner prays an appeal to the Supreme Court of the United States."

RICHARD BALLARD v. EVAN EDMONSTON.

A mother cannot bind out her child as an apprentice.

THE petition of Richard Ballard stated, that on the 9th of

April, 1816, one Evan Edmonston, an infant under twenty-one years of age, by indentures signed and sealed by his mother, Sarah Edmonston, was bound to the petitioner for nine years from the 5th of June next following, to learn the trade of a tailor. That he came and served as an apprentice until about two months past, when he left the service of the petitioner, although the nine years have not yet expired, and the said Evan is still a minor, and refuses to return to his service, alleging that he is not bound by the indentures. The petitioner therefore prays that the said Evan may be brought before the Court to abide such order as the Court may deem just and equitable.

The indenture was in the common form, but signed and sealed by the mother, and not by the son.

By the 7th section of the Act of Maryland of 1793, c. 45, it is provided, that, "in case the contract, whether defective in form or not, hath been partly executed, the said county or criminal court may award and compel the terms or any part of the terms to be performed by the master or mistress, or by the apprentice, as justice and equity may require; and the master or mistress of any apprentice may detain the said apprentice in his or her service, till discharged by the court aforesaid; and the said master or mistress may maintain such action against strangers, as if such apprentice had been legally bound to serve."

Mr. Ashton, for the petitioner, contended, that under the 7th section of the act, as the contract had been so far executed, on his part, the Court should order it to be completed on the part of the boy, although the indentures are defective in form. The act does not mean mere technical form of the indentures, but the invalidity of the indentures from any cause. Here the contract was, that the boy should serve the petitioner as an apprentice. The indentures were only matter of form; and although they may be defective, the contract continues, and under that section of the law, may be enforced with such modification, or upon such terms as the Court may deem just and equitable.

Mr. Coxe, contra. By the common law the infant could not bind himself, nor could the mother bind him. The Act of 1793, c. 45, § 4, only authorizes the father to bind out his infant son. The mother has no such power. There were therefore no parties competent to contract, and therefore there was no contract. When a power is given by statute, all the requisites of the statute must be complied with.

The COURT (THRUSTON, J., absent,) decided, that there was no contract binding on the boy, and ordered him to be discharged.

DANIEL BUSSARD v. SALVADORE CATALINO.

In taking a deposition under the Act of Congress, it is not necessary that the notice to the opposite party should require him "to put interrogatories if he should think fit;" nor that the magistrate should certify that the witness was sworn to testify the whole truth "in the matter in controversy;" nor that the testimony, if reduced to writing by the witness, was so reduced to writing in the presence of the magistrate.

Nor will a deposition be rejected on account of the evidently accidental omission of a word in the magistrate's certificate of the caption.

The attendance of only three witnesses to any one fact, will be allowed to be taxed against the opposite party, unless the Court shall be satisfied by affidavit, that the party who summoned them had good reason to believe that their testimony would be necessary to support the issue or issues on his part.

ASSUMPSIT, for money let, &c.

Mr. J. Dunlop, for the plaintiff, objected to the deposition of *E. W. Duvall*, taken on the part of the defendant, before *Thomas Carberry, Esq.*, mayor of Washington, in the presence of the plaintiff.

1. Because the notice to plaintiff to attend at the time and place of caption, did not require him "to put interrogatories if he should think fit."

2. Because in the certificate of the caption, the word "not" was omitted before the words "less than at the rate of one day for every twenty miles."

3. Because the magistrate has not certified that the witness was sworn to testify the whole truth "in the matter in controversy."

4. Because he has not certified that the part of the testimony which was reduced to writing by the witness himself, was so reduced in the presence of the magistrate. It being only certified that the testimony was reduced to writing by the witness and the magistrate.

The COURT, however, overruled all these objections; *CRANCH, C. J.*, doubting as to the last, but assenting, because the parties had agreed to receive that part of the testimony which appeared to be in the deponent's handwriting.

Verdict for the defendant, by assent of the plaintiff, without any evidence having been produced on either side. The defendant having summoned upwards of thirty witnesses, the plaintiff objected to their being taxed against him.

The COURT (*nem. con.*) directed the clerk not to tax more than three witnesses for the defendant, unless the defendant should satisfy the Court by affidavit of the particular points to prove which they were summoned, and that they were necessary to his defence. Upon such affidavit being made, the Court allowed all to be taxed, excepting six; there having been nine summoned to one point.

Burch v. Spaulding.

ADAMS v. KINCAID, Administrator of A. McPhail.

A justice of the peace, under the Act of Congress for extending the jurisdiction of justices of the peace, has not jurisdiction of suits against administrators.

ADAMS brought suit, by a warrant of arrest, against Kincaid, administrator of McPhail, for services rendered by the plaintiff to McPhail in his lifetime. The account was proved and passed by the Orphans' Court. The warrant was returnable on the 13th of August, 1823, before Mr. Moulder, a justice of the peace, who adjourned the cause for consideration to the 18th, and again to the 20th, when "after a full hearing," he rendered judgment for the defendant, for costs, \$1.16.

Upon the appeal, *Mr. Dunlop*, for the appellee, contended that a justice of the peace has no jurisdiction in suits against administrators.

Mr. Wallach, for the appellant, referred to the new Act of Congress of the 1st March, 1823, [3 Stat. at Large, 743,] extending the jurisdiction of justices of peace in the recovery of debts in the District of Columbia, by which it is enacted, "that from and after the 1st day of June next," (1823,) "in all cases where the real debt and damages do not exceed the sum of \$50, exclusive of costs, it shall and may be lawful for any one justice of the peace of each respective county in the District of Columbia, wherein the debtor doth reside, to try, hear, and determine the matter in controversy, between the creditor and debtor, their executors and administrators, and upon full hearing of the allegations and evidences of both parties, to give judgment according to the laws existing in the said District of Columbia, and the equity and right of the matter, in the same manner, and under the same rules and regulations, to all intents and purposes, as such justices of the peace are now authorized and empowered to do when the debt and damages do not exceed the sum of \$20, exclusive of costs."

The COURT (THRUSTON, J., absent,) was at first inclined to the opinion, that the justice of the peace had jurisdiction under the new act; but after further consideration, affirmed the judgment with costs.

SAMUEL BURCH *et al.*, Administrators of Dougherty, v. R. SPAULDING, Administrator of Electus Spaulding.

It is no disqualification of the plaintiff's witness, that he is a surety in the plaintiff's administration-bond.

Powling v. Varnum's Administratrix.

Bank-checks, drawn by the plaintiff, payable to bearer, and paid by the bank, are not, of themselves, evidence of money paid to the defendant.

This was an action to recover money overpaid by the plaintiffs' intestate, who was clerk of the House of Representatives of the United States, to the defendant's intestate, who was one of the officers of the House.

The plaintiffs offered to examine Benjamin Burch as a witness.

The defendant objected that he was interested, being one of the sureties of the plaintiffs in their administration-bond, and also a surety in Dougherty's official bond as clerk of the House, so that whatever the plaintiffs would recover in this action would increase the assets of his estate, which was largely indebted to the United States.

But the COURT (MORSELL, J., absent,) overruled the objection.

The plaintiff offered in evidence, sundry checks drawn by Dougherty, as clerk of the House, in favor of Spaulding, or bearer, which were paid by the bank, and charged to Dougherty in his account with the bank.

But the COURT (THRUSTON, J., *contrà*.) decided that the checks were not evidence to the jury of payments of money to Spaulding.

Motion for new trial overruled at December term, 1824.

SAMUEL LEWIS v. ROBERT ESTHER.

If a man contract to do certain work, at a certain price, and quits it before it is finished, he cannot recover upon a *quantum meruit*, the value of his labor.

THE plaintiff agreed to do certain work for the defendant, for the sum of \$125. He began, but abandoned it before it was finished, and now sued for *quantum meruit*, and offered to prove the value of his work.

Mr. Jones, for the defendant, objected that there was an express, specific agreement at a certain price, and therefore the plaintiff could not recover upon an implied *assumpsit*.

Mr. Ashton, *contrà*, contended that, by usage, money is due as the work progresses, otherwise a poor mechanic cannot go on.

But the COURT (*nem. con.*) rejected the evidence, and instructed the jury that the plaintiff is not entitled to recover in this action.

POWLING v. VARNUM'S ADMINISTRATRIX.

If the plaintiff does certain work for the defendant's intestate, under a special contract to be paid for it by the conveyance of a lot of ground, it is not competent for him in an action of general *indebitatus assumpsit* against the defendant for work and labor

Powling v. Varnum's Administratrix.

done in the lifetime of her intestate, to recover the value thereof, without showing fraud in the defendant's intestate in making the contract; and it is not competent for the plaintiff to show that the defendant's intestate never had a good title to the lot without evidence of such fraud, or other evidence showing that the plaintiff had a right to rescind the contract.

INDEBITATUS ASSUMPSIT, for work and labor done and materials furnished for the defendant's intestate by the plaintiff, who was a painter and glazier.

The defendant produced a written contract, dated February 7, 1820, under which the work was done; and in which the plaintiff, after stating that he had on that day leased a lot of the defendant's intestate, James M. Varnum, for the term of ten years with the privilege of purchasing the same within that time, agrees to do work and find materials to that amount within two years, if required by the said Varnum. And by the lease, referred to in that agreement, the plaintiff had a right, during the ten years, to purchase the lot at the price of \$474; and upon payment of that sum, over and above the rent, the said Varnum agreed to "make and execute a good and sufficient deed of conveyance of all his estate, right, and interest in and to the said lot, unto the said John Powling, his heirs and assigns forever." The plaintiff afterwards agreed not to require a deed of the lot until a note of \$300, discounted for the plaintiff at the Bank of the Metropolis, and for which the said Varnum was guaranty, should be fully paid; which note was not paid at the time of the trial.

Mr. Key and Mr. Redin, for the plaintiff, offered evidence to show that Mr. Varnum had not a good title to the lot. The defendant proved that the plaintiff had been in possession of the lot from the date of the lease.

The Court (*nem. con.*) refused the evidence offered by the plaintiff to show defect of title, unless accompanied by evidence of fraud in the original contract respecting the work and conveyance of the lot; or evidence showing that the plaintiff had a right to rescind the contract.

The plaintiff's counsel then, in order to show such fraud, offered evidence that Mr. Varnum bought the lot for \$30 at a tax sale; that the price which the plaintiff was to allow him for it, in work, was the full value of a good title; that the title under the sale for taxes was worthless; that Mr. Varnum was a shrewd, speculating man, well acquainted with the city titles, and that the plaintiff was a plain, unlettered man. That the validity of the tax sales had been questioned in 1819, and a bill in chancery, in the case of *Greenleaf et al. v. The Corporation of Washington*, to set them aside, was pending at the time of this contract, and must have been known to Mr. Varnum, who was a member of the corporation.

Varnum's Administratrix v. Mauro.

Mr. Jones, for the defendant, objected to the admissibility of the evidence so offered by the plaintiff in support of his allegation of fraud; and prayed the opinion of the Court that it was wholly inadmissible as evidence to impeach the title of the said Varnum to the lot in question; and that it was incompetent and inadmissible as evidence of any fraudulent misrepresentation or concealment of the said Varnum, to the effect of avoiding the said contract between the said Varnum and the plaintiff.

Which opinion and instruction the COURT gave as prayed. (THRUSTON, J. *contra*.)

Verdict for the defendant. A bill of exceptions was taken by the plaintiff's counsel; but no writ of error was prosecuted.

VARNUM'S ADMINISTRATRIX v. MAURO.

A partial failure of consideration is no defence to an action by the payee against the maker of a promissory note.

ASSUMPSIT against the maker of two promissory notes, payable to the plaintiff's intestate, James M. Varnum, amounting to \$440.

The defendant, in order to show that the notes were given without consideration and under a mistake and misrepresentation of the value supposed and intended to have been passed to the defendant therefor, offered to prove that certain persons had connected themselves in special partnership and association for carrying on certain mercantile adventures in a certain ship called "The James Monroe;" that among the fundamental articles and terms of such partnership and association, it was mutually stipulated and agreed between the original partners, that no partner should in any manner sell or dispose of his interest or *aliquot* share in the said company and concern; that notwithstanding the said stipulation and agreement among the said partners, one of them undertook to sell his interest and *aliquot* share in the said concern to the said James M. Varnum; who afterwards bargained with the defendant for the same interest and *aliquot* share at the price of \$440, for which the defendant gave the notes in question, being then ignorant of the said stipulation and agreement of the said partners; that afterwards when the defendant applied to be recognized and admitted as one of the partners in the said company and association, he was rejected as such by the company, who refused to admit or recognize the interest of any assignee; that the company proceeded to conduct its concerns in all matters relating to the business of the said association without permitting the defendant to participate at all in the capital of the concern or in

Bolton v. White.

the conduct of its business, in which two thirds of its capital was sunk by misconduct or negligence; and that the defendant has never received any written assignment of the said interest or *ali-quot* share, nor has he ever been allowed by the company any dividend, either of the profit or the capital.

To the admission of this evidence the plaintiff objected, and the COURT (*nem. con.*) sustained the objection; being of opinion that the facts, if proved, would be no defence in this action.

The defendant took a bill of exceptions, but did not prosecute a writ of error.

RICHARD JONES v. L. H. JOHNS.

A witness will be permitted to refresh his memory as to the items of an account for work and labor by the original entries only, made by himself, or by another in his presence; and although he has no distinct recollection of each particular item charged, yet if he has a distinct recollection of such work as is charged in the account generally, being done, and after having refreshed his memory, if he can swear that the work was done as charged in such account, his testimony will be competent evidence.

ASSUMPSIT upon a blacksmith's bill of work done for the defendant's plantation, from September, 1816, to August, 1822, amounting to \$1,349.56.

Mr. Marbury, for the defendant, contended that as the witness had no distinct recollection of the particular items independent of the entries in his handwriting in the day-book, his testimony was not competent evidence to the jury.

The COURT, (*nem. con.*) after hearing argument and authorities, gave the following opinion: The witness shall be permitted to refresh his memory only from the original entries made by himself or another in his presence. In addition to this, if he has no distinct recollection, independent of such entries, of each particular item charged, he must, at least, have a distinct recollection of such work as is charged in the account generally, being done by the plaintiff for the defendant; and if, after having so refreshed his memory, he can swear that the work was done as charged in such entry, his testimony will be competent evidence.

BOLTON v. WHITE.

An affidavit made before a judge of one of the State courts, in order to obtain an attachment under the Maryland Act of 1795, c. 56, is not good evidence for that purpose, "unless there be thereto annexed a certificate of the clerk of the court of

The Central Bank of Georgetown and Washington v. Tayloe.

which he is a judge, or a certificate of the governor, chief magistrate, or notary-public of such State, that the said judge hath authority to administer such oath."

This was an attachment under the Act of Maryland of 1795, c. 56.

Mr. Marbury moved the Court to quash the attachment, because the affidavit made to obtain the attachment was made before a judge of the State of New York, and the notary-public who had certified the judge, had not certified that he had authority to administer the oath according to the second section of the Act of 1795.

The COURT, at first, doubted whether *Mr. Marbury* could be heard, as he did not appear for any party in the cause; and requested him to ascertain what had been the practice in the courts of Maryland.

He afterwards produced the case of *Campbell v. Morris et al.*, in *Harris & M'Henry's Reports*; and the Court permitted him to make the suggestion; and quashed the attachment.

 TENCH RINGGOLD v. CHARLES GLOVER.

A defendant committed in execution upon a *ca. sa.* is liable to the marshal for his poundage, which may be recovered in an action of *assumpsit*.

ASSUMPSIT. The declaration set forth a judgment in this Court by Owen and Longstreth against the defendant, Glover, for \$680.74, with interest, &c., and costs, and a *ca. sa.* thereon, upon which he was taken by the plaintiff, then marshal, &c., and upon the return thereof was committed in execution, "whereby the said defendant was justly indebted to the plaintiff, Ringgold, in the sum of \$27.85, for his risk and services as poundage and other fees for executing the aforesaid writ of *ca. sa.* to him as marshal of the said district directed," and being so indebted, in consideration thereof, promised to pay, &c.

The case was submitted without argument; and

The COURT (*THRUSTON, J.*, absent,) decided that the defendant, under those circumstances, was liable; whereupon he confessed judgment.

 THE CENTRAL BANK OF GEORGETOWN AND WASHINGTON v. JOHN TAYLOE.

Upon motion of the plaintiff, and notice, the Court will order the defendant to produce books and papers on a certain day before the trial, that the plaintiff may have an opportunity to inspect them.

The Central Bank of Georgetown and Washington v. Tayloe.

The Act of Congress of the 3d of March, 1817, entitled "An Act to incorporate the subscribers to certain banks in the District of Columbia, and to prevent the circulation of the notes of unincorporated associations within the said district." is a public law; and the corporate name of the bank incorporated by the 23d section thereof, is "The Central Bank of Georgetown and Washington." and not the President and Directors of the Central Bank of Georgetown and Washington.

Quere. whether the misnomer of a body corporate must be pleaded in abatement.

ASSUMPSIT, upon an open account, and for moneys lent and advanced.

Mr. Jones, for the plaintiff, having given notice, now moved the Court for an order on the defendant to produce his bank-book and surrendered vouchers, by a certain day before the trial.

Mr. Hay, for the defendant, objected, that under the 15th section of the Judiciary Act of 1789, [1 Stat. at Large, 73,] the party can only be compelled to produce books and papers in the trial, not before the trial. *Geyger's case*, 2 Dall. 332.

The COURT, however, on the 29th of December, 1823, ordered the defendant to produce his bank-book and vouchers on the 5th of January following, for the inspection of the plaintiff's counsel, in the presence of the defendant's counsel, if he wished to be present.

On the trial, *Mr. Hay*, for the defendant, contended that the plaintiffs had not sued by their corporate name, which he contended was "The President and Directors of the Central Bank of Georgetown and Washington;" and not simply "The Central Bank of Georgetown and Washington," by which they had sued. He also contended that the Act of March 3d, 1817, was a private act, and must be shown and proved. He thereupon moved the Court to instruct the jury that it was necessary that the plaintiffs, suing as a corporation, should show and prove that they had a legitimate existence, and by the name in the declaration mentioned.

Mr. Marbury, for the plaintiffs, suggested that if it was a misnomer it must be pleaded in abatement. 1 Chitty, 440; *Mayor and Burgesses of Stafford v. Bolton*, 1 B. & P. 40.

The COURT (*nem. con.*) instructed the jury that the Act of Congress of the 3d of March, 1817, [3 Stat. at Large, 383,] entitled "An Act to incorporate the subscribers to certain banks in the District of Columbia," &c., was a public law of which the Court and jury were bound to take notice, and that the plaintiffs, by that law, were incorporated by the name in which they prosecuted the present action.

The Court did not decide whether, if it had been a misnomer, it could have been taken advantage of upon the general issue; but CRANCH, C. J., and THRUSTON, J., inclined strongly to the opinion that it must be pleaded in abatement. MORSELL, J., in-

Kane v. Love.

clined to be of a contrary opinion. The Court did not say whether it was necessary that the plaintiffs should prove that they were incorporated by the name in the declaration mentioned.

W. S. NICHOLLS AND J. S. NICHOLLS v. P. WARFIELD.

The defendant's expressing a willingness to pay a debt barred by the act of limitations, if a certain account should be allowed as a set-off, is not such an acknowledgment as will take the case out of the statute.

ASSUMPSIT, for goods sold and delivered.

The defendant pleaded the act of limitations.

The plaintiffs' witness testified, that he called on the defendant with the plaintiffs' account for payment. The defendant said he did not like to pay money when money was due to him, and that he had an account against J. S. Nicholls, and would settle in that way, or words to that effect. The witness did not recollect the exact words, but is positive that the defendant made no objection to the account, and expressed a willingness to pay it, if his account against J. S. Nicholls was allowed.

The COURT (*nem. con.*) decided, in conformity with the case of *Wetzel v. Bussard*, 11 Wheat. 309, and *Jenkins v. Boyle*, in this Court at June term, 1816, (*ante*, 120,) and *Clementson v. Williams*, 8 Cranch, 72, that there was not evidence of such a promise as would take the case out of the statute of limitations.

KANE v. LOVE.

The Court will not quash a *fi. fa.* issued after the death of the defendant if it bear *teste* before his death.

MOTION to quash a *fi. fa.* because it was issued after the death of the defendant. The judgment was in the lifetime of the defendant, and the execution bore *teste* before his death.

Mr. Caldwell, for the plaintiff, cited *Bragner v. Langmead*, 7 T. R. 20.

The COURT took time to consider; and afterwards refused to quash the execution. MORSELL, J., *contrà*.

Calder v. Pyfer.

CALDER, Administrator *de bonis non*, of J. Melvin, Senior, v.
HENRY PYFER.

An administrator *de bonis non* cannot support an action in his own name for goods of his intestate sold by the previous administrator.

ASSUMPSIT for goods sold and delivered.

The declaration stated that Henry Pyfer was attached to answer to William Calder, administrator of James Melvin; and contained the common counts of *indebitatus assumpsit* for sundry matters chargeable in account; and for goods sold by the plaintiff to the defendant, and the common money counts; and also a special count, stating that the defendant, in consideration that James Melvin, junior, the administrator of James Melvin, senior, deceased, had sold and delivered to the defendant certain goods and chattels of the value of \$301.87½, the property of the said James Melvin, deceased, undertook and promised the said James Melvin, junior, to pay him the said sum of \$301.87½ when he should be thereunto afterwards required. That afterwards and before the payment of the said sum of money, and before the impetration of the original writ in this case, the Orphans' Court revoked the letters of administration granted to the said James Melvin, junior, and granted letters on the estate of the said James Melvin, senior, deceased, to the plaintiff; wherefore the defendant became indebted to the plaintiff in the said sum of money, and in consideration thereof, afterwards, &c., promised the plaintiff to pay him the said sum of money when afterwards he should be thereto required.

Mr. Marbury, for the plaintiff, cited the Maryland testamentary law, of 1798, c. 101, ch. 14, § 2; and *Hirst v. Smith*, 7 T. R. 182, and contended that there was a privity between the plaintiff and his predecessor, and that the plaintiff may recover upon the promise to the administrator, James Melvin, junior.

Mr. Key, contra. In the case of *Hirst v. Smith*, the debt was due to the intestate in his lifetime, and was part of his assets. But here the defendant never was the debtor of the intestate. The administrator sold the property of the intestate to the defendant, who thereby became the debtor of the administrator.

The COURT took time for consideration, and at the following term, (THRUSTON, J., absent,) were of opinion that the plaintiff could not sustain the action in his own name.

Stone v. Mason.

H. SMALLWOOD v. WILLIAM WORTHINGTON.

When the assignment of the time of service of a servant is in writing, parol evidence of a promise that the servant had a certain time to serve cannot be admitted.

A count averring that the defendant promised that a servant, whose time the plaintiff had bought of the defendant, had three years to serve; and that the defendant, not regarding his said promise, but contriving and fraudulently intending to injure the plaintiff, craftily and subtilely deceived the plaintiff in this, that the servant had not three years to serve, is not a count founded upon fraud, but upon the breach of the promise.

ASSUMPSIT, charging that the defendant promised that the servant, whose time of service the plaintiff had bought of the defendant, had three years to serve, when, in truth, she had only one year to serve. The declaration does not aver fraud, or a knowledge on the part of the defendant that she had only one year to serve. The plaintiff, upon the call of the defendant, produced a written contract, by which one Lowe hired the servant to the defendant, stating that she had seven years to serve from that date, November, 1815. In 1819, the defendant transferred his right, by a written assignment, to the plaintiff, which assignment did not contain any warranty.

The plaintiff offered parol evidence to prove that the defendant affirmed, at the time of the contract, that she had three years to serve.

The COURT (*nem. con.*) rejected the parol evidence.

Mr. Key, for the plaintiff, then contended that one of the counts was for deceit, and that the parol evidence was admissible to show the deceit. The count averred that upon the sale of the time of the servant, the defendant promised that she had three years to serve, yet the defendant not regarding his promise, but contriving and fraudulently intending to injure the plaintiff in this behalf, craftily deceived the plaintiff in this, that the said slave, at the time of making the said promise and undertaking of the defendant, had not three years to serve, but was entitled to her freedom in one year, &c., and had only one year to serve, whereby the plaintiff lost the benefit of her service for a long time, &c.

But the COURT (*nem. con.*) said, that the count was not for deceit, and did not aver fraud; and rejected the evidence.

JOHN STONE v. JOHN MASON.

A public officer who buys a bill of exchange for public use, and agrees to pay for it when it should be duly honored, is not personally responsible

ASSUMPSIT, for money had and received.

The defendant, as commissary-general of prisoners, received \$140 for a draft on Bermuda.

Edward Stone put the draft into the defendant's hands, and requested him to pay the money, when it should be received, to the plaintiff, of Baltimore. When the money was received at the defendant's office, his clerk inclosed it in a letter to the plaintiff, directed to him at Baltimore, but it never came to his hands. On a case stated,

The COURT (THRUSTON, J., absent,) rendered judgment for the defendant, on the ground of his being a public officer; and it being a public contract to buy a bill for public use.

GEORGE N. THOMAS v. WILLIAM ELLIOT, Bail of Mortè.

Where there are contending assignees of a cause of action pending in court, the Court will not, on motion, decide the merits of their respective claims, by ordering the action to be entered upon the docket as for the use of either of them. If special bail be taken out of court, by two justices of the peace, by recognizance, there must be two sureties.

THE *scire facias*, in this case against William Elliot, as bail for Peter Mortè, recites a recognizance before two justices of the peace for this county on the 17th of November, 1818, by which "a certain William Elliot, of the said county of Washington, came personally in his own proper person and became pledge and bail," &c., "for a certain Peter Mortè," &c., in the usual form.

The suit against Mortè was originally brought by the creditor, George N. Thomas, in his own name; who, before judgment, was discharged under the insolvent law, on the 7th of August, 1820, and assigned all his effects to John L. Brightwell, his trustee under that law, who became a party plaintiff in the place of George N. Thomas, and obtained a judgment in his own name as trustee of Thomas for \$311. This judgment is also recited in the *scire facias*.

Mr. Key, for Olla Wilson, administrator of Henry M. Wilson, obtained a rule on Brightwell to show cause why this *scire facias* should not be entered for the use of Olla Wilson, as administrator of Henry M. Wilson; and produced an assignment dated June 4th, 1819, more than a year before Thomas's application for the benefit of the insolvent act, from the said Thomas to the said Henry M. Wilson, of the proceeds of that suit, and an order from Thomas to the clerk of the court to enter the suit for the use of Wilson.

But the COURT, on the 23d of January, 1824, discharged the rule

Kurtz v. Jones.

and refused to order the cause to be entered for the use of Wilson, without prejudice to the rights of the parties.

Mr. Redin, for the defendant, moved the Court to quash the *scire facias*, because upon its face it appeared that only one person was taken by the justices as bail, whereas the act of 1715, c. 28, which is the only act which authorizes them to take special bail out of court, requires the defendant to go before the justices with two sufficient freeholders; and the form prescribed is, "you A. B. and C. D., and either of you do undertake," &c.

Every such authority must be strictly pursued, as this Court has decided in several cases upon the Act of Maryland of 1791, c. 67, § 1, authorizing judgments to be superseded. *Smith v. Middleton*, at April term, 1821, [*ante*, 233,] and *Mandeville v. Lore*, October term, 1821, [*ante*, 241]; *Rogers v. Reeves*, 1 T. R. 418; *Scryven v. Dyther*, Cro. Eliz. 672; *Symes v. Oakes*, 2 Str. 893.

Mr. Key, for the plaintiff *contra*.

The COURT (THRUSTON, J., absent,) quashed the *scire facias*, giving judgment upon the issue of "no such record."

JOHN KURTZ v. DENNIS JONES.

In the affidavit and warrant for attachment under the Act of Maryland of 1795, c. 56, it is not necessary to state the plaintiff to be a citizen of the United States or of any of the States.

Mr. Key was allowed by the Court to appear for the defendant, and moved to quash the attachment, because it did not appear in the warrant of the magistrate ordering the attachment, nor any where else in the affidavit or proceedings that the plaintiff was a citizen of the District of Columbia, or of the United States, or of any State of the United States.

Mr. Marbury, for the plaintiff, contended that it was not necessary that it should appear in any of the preliminary proceedings, but that it was sufficient if he now proved it, upon the motion for judgment of condemnation of the attached effects; and he now offered evidence that the plaintiff was at the time of his application for the attachment and still is a citizen of the District of Columbia. *Campbell v. Morris*, 3 Harris & McHenry, 553. This objection was expressly overruled by this Court in *Birch & Small v. Butler*, in June, 1806, (1 Cranch, C. C. 319.)

The Act, in describing the matter of the oath which the plaintiff is to make in order to obtain an attachment, does not require that he shall make oath that he is "a citizen of the State of Mary-

 Tayloe v. Davidson.

land or of any other of the United States," although he must, in fact, be such a citizen; and it may now be proved.

Mr. Key, in reply. The principle upon which this Court yesterday quashed the *scire facias*, because the recognizance contained only one person as bail, was, that all special authorities must be strictly pursued. The proceedings must, upon their face, show every thing necessary to sustain the jurisdiction. The justice had no authority to grant a warrant for attachment to any but a citizen. His authority should be manifest upon the face of his warrant or the affidavit of the plaintiff annexed to it. *Smith v. Middleton*, at April term, 1821, [*ante*, 233,] and *Mandeville v. Love*, at October term, 1821, [*ante*, 241]; *Wise v. Withers*, 3 Cranch, 331; *Bingham v. Cabot*, 3 Dall. 382; and *Abercrombie v. Dupuis*, 1 Cranch, 343.

The COURT (*nem. con.*) permitted evidence now to be given that the plaintiff was a citizen of the District of Columbia; and said that the point was decided by this Court in 1806, and as that decision has been acquiesced in and practised upon ever since; and as there is a superior tribunal who can correct the error, if it be one, this Court will not now overrule its former decision.

Judgment of condemnation.

A bill of exceptions was taken by the defendant's counsel; but no writ of error was prosecuted.

The debt was \$769.83.

JOHN TAYLOE v. LEWIS G. DAVIDSON.

Upon a promissory note, dated at Georgetown, D. C., by which T. C. and J. W. (not being in partnership, and one of them residing in Maryland,) jointly and severally promise to pay to L. G. D. or order, \$600, eighteen months after date, it is necessary, in order to charge the indorser, that payment should have been, in due time, demanded of each of the makers of the note, although one of them resided in Maryland, out of the jurisdiction of this Court, when the note was given, and when it became payable.

It is not necessary that payment of a promissory note should be demanded by a notary-public.

The demand may be made by any other agent of the holder.

ASSUMPSIT, against the indorser of a promissory note, made by Thomas Crawford, and John Winemiller, dated at Georgetown, D. C., May 10th, 1820, by which, eighteen months after date, they did "jointly and severally agree and promise to pay to Lewis Grant Davidson, or order, \$600, for value received.

This note was indorsed by the payee, the defendant, to the plaintiff. The plaintiff in his declaration avers, that on the 13th day of November, 1821, "he showed and presented the said

Taylor v. Davidson.

note, with the indorsement so made thereon, as aforesaid, to the said Thomas Crawford and John Winemiller, and each of them, and then and there required the said Thomas Crawford and John Winemiller, and each of them, to pay the same; but the said Thomas and John, or either of them, did not pay," &c.

Mr. Wheteroft, the notary-public, who resides in the city of Washington, at the request of the Bank of the Metropolis, whose banking-house is in Washington, demanded payment of Crawford, who resides in Georgetown, (but did not demand payment of Winemiller, who resided in Montgomery county in Maryland, a few miles from Georgetown,) on the 3d day of grace, and on the following day, put a letter into the post-office in Washington, directed to the defendant at Georgetown, in time for the mail of that day, informing him that the note had been delivered to him by the Bank of the Metropolis, and that, not being paid, he had protested it and returned it to the bank.

Mr. Key and Mr. Dunlop, for the defendant, contended that the defendant was not liable because payment had not been demanded of both of the makers of the note, and a verdict for the plaintiff was taken, by consent, subject to the opinion of the Court upon that point.

Mr. Forrest and Mr. Fleet Smith, for the plaintiff, contended that Crawford and Winemiller were to be considered as joint partners. *De Berkow v. Smith and Lewis*, 1 Esp. Rep. 29. The notary, perhaps, could not have made the demand upon both on the same day. If the drawee of a bill never resided at the place in which he is stated in the bill to reside, it excuses the want of demand, because the drawer undertakes that the drawee shall be found in that place. 1 Chitty, 213, 214, 335; *Iredell v. Kippies*, 11 Johns. 231. The note is joint and several. The plaintiff may elect to treat it as a several note. If both drawers had resided in Georgetown, a demand upon one would have been sufficient. *Anderson v. Drake*, 14 Johns. 114. Winemiller resided out of the District of Columbia, which is as distinct from Maryland as Albany was from Canada in the case of *Anderson v. Drake*, in 14 Johns. 114. Chitty, 49; *Carvick v. Vickery*, Doug. 653; *Whitcomb v. Whiting*, Doug. 651; *Caswell v. Coare*, 2 Camp. 82.

The COURT took time, till the next term, to consider, and on the 14th of April, 1824, CRANCH, C. J. (the other judges assenting,) delivered the following opinion.

I have not been able to find any case in the books exactly in point. In *Carvick v. Vickery*, Doug. 653, the bill was drawn by two who were not in partnership, in this form: "Pay to us or our order," and was indorsed by one only. The Court held that they were to be considered as partners in that transaction, and that the

Tayloe v. Davidson.

indorsement of one alone was sufficient; but on the trial it was proved by bankers, that by the uniform custom and usage of business, the indorsement of both was necessary, and so the jury decided, and I think correctly. Even in cases of general partnership, if the transaction be with one of the firm for his own separate benefit, the others are not bound, unless they had notice. *Bignold v. Waterhouse*, 1 M. & S. 259. If a bill be drawn on two persons, not partners, an acceptance by one is not sufficient. *Marius*, 16; *Carvick v. Vickery*, Doug. 653. It seems from this, that such a bill must be presented to both for acceptance; and if accepted, must be presented to both for payment before it could be so dishonored as to make the drawer liable. It seems to me that the undertaking of the defendant in the present case, as indorser of the note, was, that he would pay it, if the makers of the note did not, when payment should have been properly demanded of them. If either of them should pay it, the indorser would be discharged. He did not undertake, that if either of the makers should refuse to pay it, he would; but that if all of them refused to pay it, then he would be responsible. Otherwise the greater the number of makers, the greater the risk he would run of being obliged to pay it in the first instance; for the holder might choose to demand it of the only insolvent among them.

Upon general principles, then, I think that payment should have been demanded of each of the makers.

But it is said that Winemiller, upon whom no demand was made, resided in Maryland, out of the jurisdiction of the Court, and therefore the plaintiff was not bound to demand payment from him; and a case in 14 Johns. 114, is relied upon. That case is only alluded to by the judge, who does not even give the name of the case, nor of the court by which it was decided, nor the date of the decision. It was also a case of removal. But Winemiller has always resided in Maryland, since and before the date of the note; at least there is no evidence to the contrary. If he had been the sole maker of the note, and had always resided in Maryland, I should suppose there could be no doubt that the demand must have been made upon him. The circumstance that another is jointly and severally bound with him, cannot, in my opinion make any difference in that respect.

In *Fisher v. Evans*, 5 Binney, 541, it is decided that it is not sufficient to look for the drawer at the place where the bill is dated, if his residence be elsewhere. His being out of the jurisdiction of the Court makes no difference. The notary who made the demand upon Crawford in Georgetown, was not bound, as a notary, to go out of his jurisdiction, whatever may have been his duty as agent of the plaintiff; but this did not discharge the

Tayloe v. Davidson.

plaintiff from the obligation of making the demand. It was not necessary that it should be made by a notary-public; a demand by any other agent would have been sufficient.

From the circumstance that the note is dated at Georgetown, I think it cannot be inferred that it was to be paid there, or that the defendant undertook that the makers should be found there when the note became payable, so as to dispense with a demand of payment at the actual residence of the makers.

It is said that where there are a great number of joint and several makers of a note, it may be impossible to make demand upon all of them on the same day. This is true; and if such were the case, the law would not require the demand to be made upon all on the same day, for it never requires impossibilities. But this would go only to dispense with the time of the demand, not with the demand itself. *Freeman v. Boynton*, 7 Mass. Rep. 483.

The drawer of a bill undertakes that the drawee shall be found at the place of his residence described in the bill, when presented for acceptance; but he does not undertake that he shall remain or be found there when the bill becomes payable. If he be found there when the bill is presented for acceptance, and accept the bill, and afterwards remove, I apprehend the holder is bound to use due diligence to ascertain the place to which he had removed, and to demand payment there.

In the absence of direct authority on the subject, I feel bound, upon general principles in analogous cases, to decide that the defendant is discharged from his liability by the neglect of the plaintiff to demand payment from Winemiller, one of the joint and several makers of the note.

Judgment for the defendant.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1823, AT ALEXANDRIA.

UNITED STATES v. ELIZABETH WILLIAMS *alias* BETSY CHINGUAPIN.

A constable, in levying a distress for rent in the county of Alexandria, is not acting in the discharge of his official duty, within the principle of the law which makes the killing murder, when it would not have been murder, if he had not been an officer; and the constable can justify by those acts only which would have justified the landlord if he had personally distrained.

A distress for rent is not lawful unless there was an express contract for a certain rent. If a tenant kill a constable who comes to make an unlawful distress, the jury may, according to the circumstances of the case, find their verdict for manslaughter.

THIS was an indictment charging the prisoner with murder by killing one Elijah Chenault, a constable, who came to the house occupied by the prisoner, to levy a distress for rent, under a written order from one Holbrook the landlord, in these words:—

“Alexandria, 31st July, 1823. Betsy Williams to Abiel Holbrook, Dr. To rent, two months and fifteen days, \$6.25. Mr. Chenault: Distrain for this rent, and compel Williams to quit the premises immediately.”

Upon the trial, *Mr. Taylor*, for the prisoner, prayed the Court to instruct the jury, 1st. That that order did not purport to be an authority to him to act as constable. 2d. That if it does so import, it is not a warrant to which the prisoner was bound to yield implicit obedience; and that it is not evidence of a right to distrain, or to dispossess the tenant; and 3d. That the order was illegal on its face.

Mr. Swann, Attorney of the United States, *contrà*. The law contemplates that distresses will be made by a sheriff or other officer. Their fees for levying a distress are regulated by law. It is not necessary in the order to call him “constable,” if he were in fact a constable. It is generally understood in Virginia, that a distress can only be made by an officer. The order to distrain is not vitiated by the order to turn the tenant out of possession.

THE COURT (THRUSTON, J., absent,) instructed the jury, that Chenault, in executing the order to distrain, was not acting in the

United States v. Carr.

discharge of his official duty within the principle of law, which makes the killing murder, when it would not have been murder in case of the killing of a man who was not an officer; because he was executing a private authority only, and not acting in the public administration of justice; and that Chenault could only justify his act by the same facts which would have justified the landlord, if he had personally distrained.

The Court also instructed the jury, at the prayer of the prisoner's counsel, that the distress was not lawful unless there was an express contract for a certain rent.

The Court also was of opinion, that it was competent for the jury, upon this indictment, to bring in a verdict of manslaughter, although they should be satisfied that Chenault was not then in the execution of his official duty when he was killed.

Verdict, guilty of manslaughter.

UNITED STATES v. NEGRO RICHARD, a Slave.

Although a confession, made under a promise of favor is not, in itself, evidence against the prisoner, yet the fact of the prisoner's going to the place where the property was secreted, and identifying it, is evidence against him.

INDICTMENT for stealing planks, the property of Mr. James McGuire, a lumber merchant.

The prisoner, upon a promise that he should not be prosecuted, was induced to confess his guilt, and to go and return the stolen articles, and to select those which belonged to Mr. McGuire.

Mr. Taylor and *Mr. Fendall*, for the prisoner, contended, and *Mr. Swann*, for the United States, admitted, that he must identify the property, independently of the confession.

The Court said, that the fact that the prisoner selected Mr. McGuire's lumber was evidence against him.

Verdict, guilty.

UNITED STATES v. DAVID CARR.

In cases of misdemeanor, the Court in Alexandria will not compel the traverser to plead to the indictment, until a prosecutor's name be indorsed; and the recognizance will be respited; unless the attorney of the United States shall satisfy the Court that it is a case which ought to be excepted out of the general rule.

INDICTMENT for selling spirituous liquors without license. No name of a prosecutor was written at the foot of the indictment, as required by the Virginia statute of November 13, 1792, c. 74,

Gelston v. Adams.

§§ 24, 25. Nor had the offence been presented by the grand jury, upon the knowledge of two of their body, nor upon the testimony of a witness called upon by the Court, or the grand jury, according to the provisions of the Virginia statute of December 2, 1795, c. 188, § 2.

Mr. Taylor, for the defendant, objected to pleading until a prosecutor's name should be indorsed.

The COURT (THRUSTON, J., absent,) said that they would not compel the defendant to plead to the indictment until a prosecutor's name should be indorsed, and that the recognizance should be respited.

Mr. Swann, for the United States, stated that the recognizance had been returned by a justice of the peace, with the names of the witnesses, and he sent them to the grand jury; and that he could satisfy the Court that it is a case which should be excepted out of the general rule, and a day was assigned to hear the witnesses. See the general rule of November term, 1807.

GELSTON v. A. and A. H. ADAMS.

If the payee of a promissory note, after it has been dishonored, assigns it to a debtor of the maker, and then gives the maker a release upon his surrendering all his effects to a trustee for the benefit of his creditors, the assignee cannot recover upon the note in an action against the maker, who had no notice of the assignment until after the deed of trust and release had been executed.

THIS was an action by the assignee of a promissory note for \$436.31, made by the defendants to Jonathan Janney, and due on the 25th of July, 1822, when it was protested. Janney assigned it to the plaintiff on the 1st of August, 1822. On the 14th of August, 1822, Janney, then being a creditor of the defendants to the amount of \$66, upon an open account, attended a meeting of the creditors of the defendants, who laid before them a list of their debts, and stating Janney to be a creditor for the amount of the note, as well as of the open account. Janney did not inform the defendants of the assignment of the note, but signed the release, and accepted the satisfaction given by the defendants, which was an assignment of all their effects to a trustee for the benefit of their creditors.

The COURT (THRUSTON, J., absent,) on the prayer of *Mr. Taylor*, for the defendants, instructed the jury that if, from the evidence, they believed the facts to be as above stated, the plaintiff could not recover, although they might be satisfied by the evidence that the plaintiff was debtor to the defendants to the amount of \$288.90, until and at the time of the transfer of the note.

Renner v. Howland.

UNITED STATES v. ROBERT BROCKETT, SEN.

To cruelly, inhumanly, and maliciously cut, slash, beat, and ill treat one's own slave, is an indictable offence at common law.

THE indictment charged that the defendant, "in and upon one negro slave, named Nat, the property of him, the said Robert Brockett, Sen. in the peace of God and of the United States, then and there being, did make an assault, and him the said negro Nat, did then and there cruelly, inhumanly, and maliciously, cut, slash, beat, and ill-treat, and other wrongs and injuries to the said negro Nat, then and there did, to the great damage of the said negro Nat, and against the peace and government of the United States."

Mr. Taylor, for the defendant, contended that if the whipping be private, there is no limit, so that it does not extend to voluntary killing or mutilation. But in order to prevent the necessity of the Court's giving any instruction on this point, he admitted that if the jury should be of opinion that the offence justified the language of the indictment, it is an indictable offence.

Mr. Swann, for the United States, cited *Resp. v. Teischer*, 1 Dall. 335.

The jury found the following verdict: "We of the jury find the traverser not guilty of the counts as stated in the indictment, but recommend that the Court should express their strong disapprobation of similar conduct. C. Griffith, foreman."

RENNER v. HOWLAND.

The Court will reject a deposition, if the notice has not been reasonable. Notice given at noon to take a deposition between four and six o'clock of the same evening, is not reasonable, if there be no special circumstances to prevent an earlier notice.

THE COURT (THRUSTON, J., absent,) rejected the deposition of Bennett, taken on the part of the defendant, because the notice was unreasonable; it being given at noon to attend in Alexandria, between four and six o'clock the same evening; there being no special circumstances stated to show the necessity of so short a notice; and the intention of the witness to go to sea being known to the defendant many days before he gave the notice.

Mr. Jones and *Mr. Swann*, for the plaintiff.

Mr. Taylor, for the defendant.

LEVIN STUART v. THE COLUMBIAN INSURANCE COMPANY.

If a policy of insurance be made for six months on a vessel, stated in the policy to be then "bound on a voyage from Georgetown to Madeira, and a market between Cape Finistère and Naples, with liberty, after the expiration of six months, to freight or trade for six months more on a premium of five and a half per cent.

The risk for the second six months is upon time only, and the vessel having performed the voyage described in the policy in the first six months, had a right to go to Brazil.

If evidence be given on both sides, and be complicated, the Court will not compel the plaintiff to join in demurrer to the evidence, nor will they undertake to say what facts the party offering to demur, ought to admit as inferences from the evidence.

Nor will they compel the other party to join in demurrer, upon his offering to admit all the inferences which the Court should say the jury could reasonably infer from the evidence.

The Court will not instruct the jury upon a part of the evidence only.

The owner of a vessel, who has contracted to sell her for a certain sum, and to make a title to the vendee upon payment of the price, has an insurable interest to the full extent of the value of the vessel, and not merely to the extent of the price for which he has contracted to sell her.

THIS was a policy of insurance upon the schooner Eleanor H. Semmes, Alexander Semmes, master, for six months from the 17th of May, 1821, "now bound on a voyage from Georgetown to Madeira, and a market between Cape Finistère and Naples, with liberty, after the expiration of six months, to freight or trade for six months more on a premium of five and a half per cent. on payment being made therefor." The first six months expired, and the policy was renewed agreeably to the terms provided.

The plaintiff, who was the builder and owner, had given Captain Semmes a bond conditioned to give him a title to the vessel upon payment of \$1260.

Mr. Jones and *Mr. Hewitt*, for the plaintiff, claimed for a total loss upon the policy for the second six months.

Mr. Taylor, for the defendants, contended 1st, That the policy was upon the voyage, as well as upon time, and that the loss was not in the course of the voyage described. 2d. That the vessel was not seaworthy, not having sufficient crew, stores, and water; and 3d, That the plaintiff had no interest in the vessel.

After the reading of a number of depositions on the part of the plaintiff, and one on the part of the defendant, and examination of several witnesses on the part of the plaintiff respecting the competency of the master and crew, boats, water, &c., and the circumstances of the loss, *Mr. Swann* and *Mr. Taylor*, for the defendants, offered to demur.

Mr. Jones and *Mr. Hewitt*, for the plaintiff, objected that there was parol evidence on both sides; that the inferences to be drawn

were to be drawn from complex and perhaps contradictory testimony; and that they required the defendants to admit that the loss happened on the voyage insured, and by a peril insured against, without fraud, and that the vessel was seaworthy.

The COURT (THRUSTON, J., absent,) said, that as there was contradictory evidence, and the inferences were to be drawn from such complicated parol evidence, they would not compel the plaintiff to join in the demurrer.

The defendants' counsel then offered to admit all the inferences which the Court should say the jury could reasonably draw from the testimony and evidence offered by the plaintiff. But the Court, for the reasons aforesaid, still refused to compel the plaintiff to join in the demurrer.

The COURT (THRUSTON, J., absent,) was of opinion that the policy, for the second six months, was on time only, and that, as the vessel actually performed the voyage described in the policy, she had a right, afterwards, to go to Brazil, &c., and that the loss was within the policy.

The COURT also refused to instruct the jury that it was not competent for them to infer, from the evidence, that the vessel was seaworthy, and refused to give any instruction on the question whether the register alone was *primâ facie* evidence of the plaintiff's interest in the vessel, because there was evidence that he built her and retained the legal title in himself as security for the unpaid purchase-money; and refused to instruct them that it was not competent for them to infer, from the evidence, that the plaintiff had an insurable interest in the vessel, but instructed them that the plaintiff must show some insurable interest.

The defendants then prayed the Court, that if, from the evidence aforesaid, the jury should be of opinion that the vessel was of the value stated in the policy, and that the plaintiff's interest was not more than \$1260, and that the said Alexander Semmes had an equitable interest in the said vessel in the residue of her said agreed value, the plaintiff could not recover more than the said sum of \$1260.

Which instruction the COURT (*nem. con.*) refused to give, but instructed the jury that the interest of the plaintiff, under the contract between him and the said Semmes, as set out in the condition of the bond given in evidence, entitled him to insure the entire interest and value of the said vessel.

The defendants took four bills of exceptions.

Verdict and judgment for plaintiff, \$3780. No writ of error was prosecuted.

R. YOUNG, Judge, &c., v. J. H. MANDEVILLE'S ADMINISTRATOR.

An action will not lie against the sureties in an administration-bond until a *devastavit* has been established in a suit against the administrator.

DEBT against the sureties in the administration-bond of John Mandeville, administrator of Jonathan Mandeville.

The breach assigned was, that the administrator had failed to pay to one Joseph Janney \$111.94, and \$26.86, due from the intestate, for which a judgment had been obtained in this Court by the said Joseph against the said administrator.

Mr. Taylor, for the defendant, demurred to the replication in which the breach was assigned, and contended that no action would lie against the sureties in the administration-bond until a *devastavit* has been established against the administrator in a separate suit against him, as this Court decided in the case of *Gilpin v. Crandell's Administratrix*, at November term, 1812. [*ante*, 57.]

Mr. Swann, for the plaintiff, admitted the law to be so, according to the decisions in Virginia; but this Court is not bound by those decisions.

The COURT rendered judgment upon the demurrer, for the defendant, at May term, 1824.

CAZENOVE v. DARREL & GROVERMAN.

A creditor has no right to give a false credit upon a note so as to reduce it to the jurisdiction of a justice of the peace.

APPEAL from the judgment of a justice of the peace.

The note was for \$56.84. The warrant was for \$50. Cazenove, at the trial, admitted payment of \$6.84. The defendants refused to accept the credit, and pleaded to the jurisdiction: but the magistrate overruled the plea, and gave judgment for \$50 and costs, from which judgment the defendants appealed.

Mr. Wise and *Mr. Swann*, for the defendants, contended that they had a right to have the case tried, originally, in this Court, and that it was not in the power of the plaintiff to deprive them of that right, by giving a fictitious credit without their consent. It requires the same authority to discharge as to bind. There must be mutual consent. In England, "if a contract be for four pounds, and a plaintiff, to give an inferior court jurisdiction, will split it into several actions, a prohibition shall go." *Catchmade's case*, 6 Mod. 90.

Mr. Fendall, *contra*, contended that a creditor has a right to throw away his debt, or to extinguish it. No man has a right to the law's delay—it is no part of the contract. It was the practice in Virginia, under the petition law, to throw away part of the claim, and have a summary remedy for the residue.

This practice must have been known to the legislature, and not having provided against it, they have sanctioned it. The matter in dispute is the criterion of jurisdiction; here \$50 only were in dispute. *United States v. McDowell*, 4 Cranch, 316; *Wise et al. v. Columb. Turnpike Co.* 7 Cranch, 276.

MORSELL, J. Can consent give jurisdiction? If, in order to give original jurisdiction to this Court, the parties should agree that the debt was 56 dollars, when the real debt was less than 50 dollars, could the jurisdiction of this Court be supported?

The COURT (THRUSTON, J., absent,) said they still considered the real debt, in this case, to be \$56.84, and that the judgment must be reversed, and judgment of nonsuit entered with costs.

CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1824, AT WASHINGTON.

SHERBURNE *v.* SEMMES and Wife.

Quære. whether this Court has jurisdiction of an appeal from the judgment of a justice of the peace upon the verdict of a jury.

THIS was an appeal from the judgment of a justice of the peace, who tried the cause by a jury, under the late Act of Congress for enlarging the jurisdiction of justices of the peace in the District of Columbia, March 1, 1823. [3 Stat. at Large, 743.]

The COURT, having doubts concerning their jurisdiction, requested the gentlemen of the bar, if so disposed, to argue the question, whether this Court can try a case, either with or without a jury, which has been tried by a jury before a justice of the peace; and for that purpose, continued until the next term, all the appeals in cases over the value of \$20.

UNITED STATES *v.* JAMES CARICO.

It is not an indictable offence at common law, to obtain and take "by means of false and fraudulent pretences" from the computing-house of a merchant, sundry of his books of account.

THIS indictment charged that the defendant, with force and arms, falsely and fraudulently, by means of false and fraudulent pretences, did obtain and take from the computing-house of one N. B. Vanzandt, two books of account of the value of five dollars, of the goods and chattels of the said N. B. V. against the peace and government of the United States.

The defendant was found guilty.

Mr. Wallach, for the defendant, moved in arrest of judgment, and contended that it was only a private injury, and not indictable at common law, or under any statute; and if it were, the pre-

Rice v. Barry.

tences should have been particularly set forth, and averred to be false. *Rex v. Wheatley*, 2 Burr. 1125.

Mr. Swann, for the United States.

The Court (*nem. con.*) was of opinion, that it was not an indictable offence, and arrested the judgment.

GENERAL RULE.

ALL notices and rules of Court may be served by the marshal or his deputy, whose certificate will be received as *primâ facie* evidence of such service.

THOMAS RICE v. ROBERT BARRY.

A separate and express promise by one copartner to pay a debt of the firm, is not a promise to pay the debt of another, within the statute of frauds, although judgment for the same debt had been recovered against the other partner; and forbearance to arrest this other partner, at the request of the former, is a good consideration to support his promise.

A count upon a promise to pay in consideration that the plaintiff, who had arrested the other partner upon a *ca. sa.*, would, at the present defendant's request, forbear to prosecute that other partner upon the *ca. sa.*, and would not trouble him, but let him go out of custody of the marshal, and in further consideration, that the debt was a partnership debt for which the present defendant was equally liable with the other partner, and which he had promised that other partner to pay, is not double or multifarious, and is good even upon special demurrer.

ASSUMPSIT.

1. The first count stated that the plaintiff, at June term, 1820, had recovered judgment against one James D. Barry, in this Court, for \$648.86, with interest from a certain day, and \$15.34 costs, who was arrested upon a *ca. sa.* issued thereupon, and in custody of the marshal; in consideration whereof, and that the plaintiff, at the request of the defendant, would forbear to prosecute the said J. D. B. on that *ca. sa.* and would not trouble him, and would let him go on the said execution, and would discharge him from the custody of the marshal, thereupon the defendant promised to pay in the autumn of the year 1820. That the plaintiff, confiding in that promise, did forbear, &c., and did not trouble the defendant, and did let him go, &c., whereof the defendant had notice, and thereby became liable to pay to the plaintiff the said sum, according to the tenor and effect of the promise, and being so liable, promised to pay, &c.

2. The second count contained the same averments, with this, also, "that the said sum of \$648.86, with interest, &c., and costs,

Rice v. Barry.

for which the said judgment was rendered against the said James D. Barry, was a partnership debt, for which the said defendant was equally bound with the said James D. Barry."

3. The third count stated the judgment against J. D. B., and his arrest on the *ca. sa.*, and that, "in consideration of the premises, and that the said sum of \$648.86, with interest, &c., and costs, for which the said judgment was so rendered against the said James D. Barry, was a partnership debt, for which the said defendant was liable, and which he was bound to pay, and the payment of which he had, in fact, assumed upon himself, by contract between him and the said James D. Barry;" and that the plaintiff, at the defendant's request, would not trouble the said J. D. B., &c., as in the second count, "and would enter the said writ 'not called by consent,' on the return thereof," and would wait for payment till the autumn 1820, the defendant undertook and promised to pay the debt, &c.

To the second and third counts, the defendant's counsel, *Mr. Worthington*, demurred specially.

To the second count, because it was double and multifarious; stating two distinct causes of action, namely, a promise in consideration of forbearance to prosecute a debt of J. D. Barry, and also a promise in consideration of an existing liability in the defendant to pay a partnership debt; and because it is argumentative and repugnant. To the third count, for the same causes, and because it states "a special assumption of the defendant to James D. Barry, to pay the aforesaid debt, which is multifarious, informal, and double."

Mr. Worthington, for the defendant, contended that if it was a partnership debt, it is merged in the judgment against J. D. Barry, and had become his separate debt. The declaration does not aver that a partnership existed; and without a partnership, it could not be a joint debt.

Mr. J. Dunlop and *Mr. Jones*, *contrà*.

There is only one promise averred, and although the consideration might consist of several parts, yet there was only one cause of action.

Mr. R. S. Coxe, in reply. Each of the two counts avers two or more distinct causes of action, requiring different proof. The consideration of a joint responsibility does not go to the extent of the promise. At most, it can cover only the original debt, not the costs of the action against J. D. Barry. A joint responsibility will not support a separate promise by one to pay the whole.

A judgment against one of the firm for a partnership debt, extinguishes the joint debt; i. e., the debt is no longer joint. The original cause of action is merged in the judgment. *Clement*

Rockville & Washington Turnpike-Road v. Van Ness.

v. *Brush*, 3 John. Ca. 180. So is a specialty given by one partner. *Thom v. Goodrich*, 18 Johns. 479; *Penny v. Martin*, 4 John. Ch. Rep. 566; *Willings & Francis v. Consequa*, 1 Pet. C. C. Rep. 305. The defendant, if it was a partnership debt, was only liable with J. D. Barry, not solely liable.

The COURT (THRUSTON, J., absent,) refused to give judgment for the defendant, on the demurrer, and he withdrew it, and pleaded the general issue to all the counts.

On the trial of the general issue, *Mr. Worthington* objected to parol evidence of the promise, because the declaration avers only a promise to pay the debt of another, within the statute of frauds.

If it was a partnership debt, it was merged in the judgment against J. D. Barry, and became his sole debt as completely as if he had never been a partner.

On the next day, the COURT (THRUSTON, J., absent,) having considered the question since yesterday, stopped *Mr. Jones*, in reply, and permitted parol evidence to be given, that it was originally a joint debt; being of opinion that if it were, there was a moral obligation on the defendant to pay it; and his promise to do so was a promise to pay his own debt, and not the debt of another, within the meaning of the statute of frauds.

THE PRESIDENT, MANAGERS, AND COMPANY OF ROCKVILLE AND WASHINGTON TURNPIKE-ROAD v. JOHN P. VAN NESS.

The commissioners' book of subscriptions is *prima facie* evidence that the subscriptions were genuine, or made by persons duly authorized; and the fact that the defendant was appointed, by the stockholders, one of the managers, and had acted as such, is *prima facie* evidence of an admission, on his part, of the existence of the corporation. Directors *de facto*, of a corporate body are to be considered, *prima facie*, as directors *de jure*.

It is not incumbent on the plaintiff to prove that the managers were elected by a majority of votes.

It is not competent for any stockholder to deny the existence of the corporation.

It is not competent for a real original subscriber to the company, who was one of the commissioners, named in the act of incorporation, for receiving subscriptions, and who acted as such, and who was afterwards, at a meeting of the stockholders, elected as one of the managers, and acted as such, to object, in an action by the company against him for not paying the instalments called for, that a sufficient number of shares had not been subscribed to justify such election.

This was an action on the case for \$1615, being the amount due from the defendant for his subscription upon eighty-five shares of the capital stock.

The plaintiffs read the Act of Maryland of the 3d of February, 1818, ch. 97, entitled "An Act to incorporate companies to make certain turnpike roads through the counties of Montgomery,

Frederick, and Washington, and for other purposes," and also the Act of Congress of the 15th of February, 1819, [3 Stat. at Large, 482,] entitled "An Act to authorize the President and Managers of the Rockville and Washington Turnpike," &c., and also the original subscription book opened at the city of Washington, by the defendant and the other commissioners named in the Maryland Act, and the book containing the original minutes of the proceedings of the company, showing the time of the organization of the company, and the election of the defendant as one of the managers, and his acting as such, and the orders for the payment of the instalments, &c.

Mr. Hay, for the defendant, contended that the plaintiff must show itself to be a body corporate, and must prove that the 1500 shares required by the charter to be subscribed, were actually taken by real *bonâ fide* subscribers, and offered evidence to prove that the subscription of J. H. Blake, for fifteen shares, as entered in the subscription book by the defendant, was so entered by the defendant without the authority of the said Blake; that it was made publicly without specifying or alleging any authority therefor; and was so made from a desire to complete the subscription in order to justify the organization of the company, and under an expectation that such subscription would be ratified by the said Blake, whose name was thus subscribed.

Mr. Hay also offered to prove that so many of the subscriptions were made in the names of persons without their authority, as would reduce the number of shares actually subscribed for, below 1500, the number required by the charter as a prerequisite to the organization of the company.

Mr. Jones, contra. The company was actually organized, managers chosen, of whom the defendant was one. The plaintiff cannot be bound, in an action against this defendant, a stockholder, to prove the handwriting of all the subscribers, nor that the subscriptions were *bonâ fide*. As against this defendant, the book of subscriptions is conclusive evidence. The plaintiff is only bound to prove that it is acting as a corporation *de facto*. This Court has so decided in the case of *The Mechanics' Bank of Alexandria v. Minor et al.* If it is a corporation *de facto*, it must be presumed to be so *de jure*, until those who exercise the franchise shall be removed by *quo warranto*.

The COURT (*nem. con.*) refused to receive the evidence offered, saying, that as the defendant was a real original subscriber to the company, and was one of the commissioners for receiving the said subscriptions, and was elected one of the managers of the said company, and acted as such, in virtue of the said election, it was not competent for him, in this action, to object that a sufficient number of shares had not been subscribed to justify such election.

Rockville & Washington Turnpike-Road v. Andrews.

The COURT also (*nem. con.*) was of opinion that the commissioners' book of subscriptions is *primâ facie* evidence that the subscriptions were genuine, or made by persons duly authorized, and that the fact that the defendant was elected one of the managers by the stockholders, and acted as such, is *primâ facie* evidence of an admission, on his part, of the existence of the corporation.

That directors *de facto*, of a corporate body, are to be considered *primâ facie* as directors *de jure*, and that it was not incumbent on the plaintiff to prove that the managers were elected by a majority of votes.

That it is not competent for any stockholder to make the objection to the existence of the corporation, inasmuch as they have chosen the president and managers; and have had all the benefits of the corporation. They cannot now set up as a defence their own want of power.

Verdict for the plaintiff, \$1,405 with interest, &c.

The defendant took a bill of exceptions, but did not prosecute a writ of error.

THE PRESIDENT, MANAGERS, AND COMPANY OF THE ROCKVILLE AND WASHINGTON TURNPIKE-ROAD v. GEORGE P. MAXWELL.

The Rockville and Washington Turnpike Company may maintain an action against a stockholder for the amount of his subscription, and are not obliged to resort to a sale of his shares.

THIS was a case like the preceding case, and the COURT (*nem. con.*) decided that the plaintiff was not confined to the remedy by a sale of the shares of a delinquent stockholder, but had a substantive cause of action against him for the subscription money; and that a subscriber could not discharge himself from his obligation by an abandonment of his shares.

THE PRESIDENT, MANAGERS, AND COMPANY OF THE ROCKVILLE AND WASHINGTON TURNPIKE-ROAD v. CHRISTOPHER ANDREWS.

In this case, which was like the two preceding cases, the COURT (*nem. con.*) decided that the pamphlet of the laws of Maryland, published by the authority of the legislature of that State, and proved by a witness to be the book which is admitted as evidence of the laws of Maryland in the Courts of Maryland, is admissible

Ash v. Hayman.

evidence of the act of incorporation of "The President, Managers, and Company of the Rockville and Washington Turnpike Road."

Verdict for plaintiff. A bill of exceptions was taken by the defendant, but no writ of error prosecuted.

WILLIAM W. AND THOMAS CORCORAN v. THOMAS HODGES.

If a promissory note be indorsed by the defendant without an intention of giving credit to the note, and without having received any value for it, and only to comply with the form required by the plaintiff in the course of his business as an auctioneer, and if it was so understood at the time by the plaintiff, who declared he so considered it, the plaintiff cannot recover.

So decided by the Court. Verdict for defendant.

Motion for new trial on the ground of misdirection of the jury by the Court, overruled. The Court said that between immediate parties parol evidence is admissible to show that there was no consideration, and that the defendant did not indorse the note to give it credit; and that this was in effect the substance of the instruction given.

Judgment for defendant. The note was for \$418.55.

ASH v. HAYMAN.

Terms offered by way of compromise cannot be given in evidence to rebut the statute of limitations.

ASSUMPSIT, upon the defendant's promissory note due in 1806. The defendant pleaded the statute of limitations.

To take the case out of the statute, the plaintiff offered in evidence a letter from the defendant to the witness, in which he says, "I am desirous that Mr. Ash's claim should be settled;" and offers to pay \$150, which was half of the amount of the note without interest.

This evidence was objected to by *Mr. Marbury*, for the defendant, on the ground that it was a mere offer to compromise; and he relied upon the case of *Neil v. Abbott*, in this Court, at December term, 1819, [*ante*, 193.]

The COURT (THRUSTON, J., *contra*,) rejected the evidence.

Young's Case.

NICHOLAS YOUNG'S CASE.

This Court has a discretion to grant or refuse a license for a ferry over the eastern branch.

NICHOLAS YOUNG petitioned the Court for a license to keep a ferry over the eastern branch of the Potomac, alongside of the eastern branch bridge, and a rule was granted to the Avacostia Bridge Company, and the Navy Yard Bridge Company, and the Eastern Branch Bridge Company to show cause why it should not be granted.

Mr. Marbury, for the petitioner, cited the Acts of Maryland, November, 1781, c. 22, and April, 1782, c. 31.

By the Act of 1781, c. 22, § 1, the justices of the county courts are authorized and required to grant their license to any inhabitant of their county to keep a public ferry at any place within their county then used as such, if they should think that a public ferry ought to be kept there; and if any person should keep ferry for hire or reward without such license, he should forfeit £5, for every offence.

By the Act of April, 1782, c. 31, § 3, it is enacted, "That when, and as often as any person shall apply to the justices of any county court for a license to keep a public ferry, and shall offer two good and sufficient securities, the said justices may and shall grant a license to such person to keep ferry, notwithstanding the said court may have, previous to such application, granted license or licenses to other persons to keep ferry at the same place."

By the Act of Congress of 3d of March, 1801, [2 Stat. at Large, 115,] "supplementary to the Act concerning the District of Columbia," section 1, it is enacted that the Circuit Courts of the District of Columbia shall have the same power respecting ferries, &c., for the county of Washington as had been theretofore exercised by the county and levy courts of the State of Maryland.

Mr. Marbury, contended that the Act of 1782 was peremptory upon the Court and left them no discretion, the petitioner having offered "two good and sufficient securities," and cited the cases of *Thomas v. Cofield*, and *Ringgold v. Cofield*, so decided in the Court of Appeals of Maryland in 1810 and 1812, in chancery.

Mr. Key, contra. This is an application to the discretion of the Court. The Act of 1781, is applicable only to places then used as ferries. This is an application for a new ferry. The old ferry has ceased for many years, and the owner of the old ferry and landing, Matthew Wigfield, was one of the petitioners

Crawford's Case.

for the erection of the Eastern Branch Bridge. If the landing had ever been condemned it has, by *non-user*, reverted to the owner. In the case of *Cofield*, the petition was not for a new ferry.

Mr. Marbury, in reply. This is not an application for a new ferry. This Court granted a license for this ferry in 1815.

The COURT (MORSELL, J., *contrà*,) decided that they had a discretion, and refused to grant the license, as the object was to compel the bridge companies to take less toll than they are authorized by law to take. The bridge companies are liable to prosecution and forfeiture if they suffer their respective bridges to be out of repair; and if any one may keep a ferry along-side of them they may not be able to keep them in repair, and the companies may be destroyed, to the great injury of the public.

NOTE. The petitioner, or some other person, afterwards set up a ferry near the bridge, and the Court, by injunction, restrained him from receiving hire or reward for the transportation of persons, &c. across the branch.

 THOMAS CRAWFORD'S CASE.

If a petitioner for the benefit of the Insolvent Act of the District of Columbia, upon the filing of allegations by his creditor or creditors, charging him with having assigned part of his property, within twelve months next preceding his application for relief, with intent to give a preference to any creditor or surety, withdraws his petition; such withdrawing is no bar to his relief under the Act, upon a new petition and application made after the expiration of the twelve months from the time of giving such preference.

The judge will not direct interrogatories to be filed, nor an issue to be tried upon vague allegations; nor unless the allegations charge the debtor with having conveyed, lessened, or disposed of part of his property, rights, or credits, with intent to defraud his creditors; or with having at one time within twelve months next preceding his application, lost by gaming, more than \$300; or with having, within the said twelve months, assigned or conveyed a part of his property, rights, or credits, with intent to give a preference to a creditor or surety.

A preference given more than a year before the application for relief is no bar thereto.

THOMAS CRAWFORD was a petitioner to the Hon. James S. Morsell, one of the judges of this Court, for the benefit of the insolvent act of the District of Columbia, of the 3d of March, 1803. [2 Stat. at Large, 237.]

Peter Brady, one of his creditors, appeared by *Mr. Wallach*, his attorney, and orally objected to the discharge of the debtor, alleging that he had before applied for the benefit of the act, and upon certain allegations being filed against him, had withdrawn his petition and abandoned his application for relief.

The application was now, on the 22d of April, 1824, made to

Crawford's Case.

Judge Morsell, who was permitted to bring it before the Court for the consideration and advice of the judges.

Mr. Jones and *Mr. Key*, for the petitioner, objected that no allegations can be received unless in writing, and filed, and the judge being of that opinion,

Mr. Wallach filed allegations in writing, charging,

1. That on the 17th of April, 1823, the said Thomas Crawford filed his petition for the benefit of the act, &c., and that certain allegations were then and there filed on the part and behalf of Peter Brady, one of his creditors, charging him, among other things, with having within twelve months before his application for relief conveyed certain goods and chattels the property of the said debtor to certain creditors and sureties, which, among other things will appear by reference to the said allegations, and that after the filing of the said allegations, namely, on the 2d of May, 1823, the said debtor withdrew, or attempted to withdraw his said petition, and did not submit to the trial of the said allegations, whereupon it was ordered by the judge that the jury be discharged and the papers recorded, and subject to any future order in the premises on any future petition of said Crawford.

2. That the said Thomas Crawford did, within twelve months preceding the said 17th of April, 1823, the day of filing his said first petition, &c., convey a certain negro boy, named John, to a certain Jaunaro S. Favre, a creditor or surety of the said Thomas Crawford, with intent to give a preference to the said Jaunaro S. Favre over other creditors or some of them.

There were five other allegations charging him with conveying property to sundry other creditors within twelve months before the 17th of April, 1823, with intent to give them preference; and the said Brady insisted upon the other allegations which he had filed in May, 1823, upon the debtor's first petition;

1. The first of which allegations charged that the said Thomas Crawford, did within a few months, being less than a year before his application for the benefit, &c., "dispose of a part of his furniture with intent to defraud his creditors."

2. That he did, on or about the 8th of April last, "dispose of certain personal property, in trunks sent from Mrs. Sarah Crawford's, with intent to defraud his creditors."

3. That he did, with intent to defraud his creditors, early in the month of April last, "dispose of certain other personal property in trunks and bundles sent away from Georgetown, from the house of a certain John Abbott, and from the city of Washington, from the house of William O'Neal."

The fourth, fifth, sixth, seventh, eighth, ninth, and tenth allegations charged him respectively with giving preferences to sundry creditors before the 17th of April, 1823.

The present petition was filed on the 22d of April, 1824 ; and the 30th was assigned for the hearing.

Mr. Key and *Mr. Jones*, for the petitioner.

The judge can only regard the allegation of some of the matters mentioned in the seventh section of the original act of the 3d of March, 1803, which are

1. The disposing of property to defraud creditors.
2. Loss by gaming, and
3. The assigning of property to give a preference to a creditor, within the year.

It is contended that no debtor who has withdrawn his petition, or who has been defeated, can ever after be relieved under the act. But even if relief has been once denied because the debtor had given a preference within the year, he may apply again after the year and be relieved.

A disposition of property to defraud creditors must be such a disposition as operates at the time of the application for discharge, and actually then deprives the creditors of property then existing : a disposition of property fully complete, and executed, and the property consumed, is not within the meaning of the act. All the allegations which charge fraud are altogether vague and uncertain.

Mr. Hay, for the creditor, contended that the withdrawing of his petition by the debtor, under the circumstances of the case, was a bar to his relief under a subsequent petition. He admitted that the fraud must be a fraud upon creditors existing at the time of the application ; but he contended that the allegations need not be more specific than they were ; and that the clause of the act which authorized the judge to require the debtor to answer interrogatories upon oath was intended to furnish the means, or to supply the place of precision in the allegations.

The judge (*Hon. J. S. MORSELL*), (*CRANCH, C. J.*, concurring, and *THRUSTON, J.*, doubting,) was of opinion that the abandonment of the first petition is no bar to his present application. *THRUSTON, J.*, however, concurred in the opinion that if the petitioner be refused a discharge because he had given a preference within a year before his application, it is no bar to his subsequent application after the expiration of the year next after the preference given.

The judge (*MORSELL*), also decided that a preference given more than a year preceding his present application for relief, was not a bar thereto. The judges all concurred in deciding that all the allegations of disposing of property with intent to defraud his creditors were too vague, and that the defendant was not bound to plead to them so as to make up an issue thereon.

The debtor was then discharged by the judge.

THOMAS KNOWLES'S ADMINISTRATRIX v. WILLIAM STEWART.

The acceptor of an inland bill of exchange is a competent witness to prove that the bill was drawn by the defendant for the accommodation of the plaintiff without any consideration, after being released by the defendant from liability for the costs of this action in case the plaintiff should recover.

The circumstance, that the act of limitations would be a bar to the plaintiff's action against the witness upon his acceptance if the plaintiff fails in this action against the drawer, but would be no bar to an action which this defendant might bring against the witness upon his acceptance, in case this defendant should be compelled by this suit to pay the money, does not render the witness incompetent by reason of interest.

ASSUMPSIT, by the payee against the drawer of the defendant's inland bill on William Lee, and by him accepted, payable to the plaintiff or order.

Mr. Marbury, for the defendant, offered William Lee, the acceptor, as a witness to prove that the bill was drawn for the accommodation of the plaintiff, without any consideration as between him and the defendant; and cited *Chitty on Bills*, 528, Ed. 1821, Phila., in a note.

Mr. Turner, for the plaintiff, objected that no party to a negotiable paper can be a witness to invalidate it, or rather to prove that it was originally void; and cited *Walton v. Shelley*, 1 T. R. 296, and the cases referred to in the note to *Chitty*, 528, Phila. Ed. 1821.

Mr. Marbury, in reply, cited *Jordaine v. Lashbrooke*, 7 T. R. 601, and *Gaither v. Lee*, in this Court, in June, 1820, [*ante*, 205.]

The COURT (*nem. con.* but *THRUSTON, J.*, perhaps, doubting,) said that the doctrine of *Walton v. Shelley*, was overruled by *Jordaine v. Lashbrooke*, and this Court has followed the doctrine of the latter case.

Mr. Turner then objected, that the witness was interested, for if the plaintiff recovers against the defendant, the defendant would have a right of action against the witness for the costs of this suit and the damages.

The COURT thought this was a valid objection; but the defendant released the witness from his liability for those costs.

Mr. Turner then objected, that the act of limitations would be a bar to the plaintiff's action against the witness, the acceptor, if the plaintiff fails in the present action; but it would be no bar to the action which this defendant might bring against the witness upon his acceptance, in case this defendant should be compelled in this suit to pay the money.

But the COURT overruled the objection, and permitted *Mr. Lee* to be sworn and examined.

RICHARD DAVIS v. ADAM ROBB.

If the agency be special, the plaintiff must show the transaction to be within the scope of the agency.

The declarations of the agent in support of his authority, will not be received in evidence, unless cotemporaneous with, and constituting part of, the *res gestæ*.

ASSUMPSIT on a promissory note signed "Adam Robb by John N. Robb."

To prove the agency of John N. Robb, the plaintiff produced evidence that John N. Robb carried on a tan-yard for his father, the defendant, who had confessed judgment on a note signed as the present note is signed, and given for articles furnished to the tan-yard.

The COURT (THRUSTON, J., doubting,) refused to permit the note to be given in evidence, unless the plaintiff could show that it was given in relation to the business of the tan-yard.

Mr. Redin, for the plaintiff, then offered to give in evidence to the jury the declarations of the said John N. Robb, made after the transaction, to show that the goods for which the note was given, were furnished by the plaintiff for the tan-yard.

The COURT (THRUSTON, J., *contrà*,) refused to permit them to be given in evidence, unless they were cotemporaneous with the giving of the note, and part of the *res gestæ*.

Verdict for the plaintiff.

JAMES C. WILSON v. DAVID PORTER.

A declaration upon a note payable to J. S. and averring that J. S., "acting by authority, and as agent of said defendant, indorsed the said note for and in behalf of the said defendant, by writing thereon the name of him the said J. S. as agent of the said defendant;" should also aver that the note was made payable to the said J. S. as the agent, and for and in behalf of the said defendant, otherwise the note will not appear to be indorsed by the said J. S. in the character in which it was made payable to him; and so no title in the plaintiff.

ASSUMPSIT, against the defendant as indorser of Edgar Patterson's note for \$49.23, payable to John Shreve or order, sixty days after date, and indorsed, "for the Union Steamboat. John Shreve."

The declaration contained a count upon the note, stating it to have been made by E. Patterson, payable to John Shreve, and that the said John Shreve, "acting by authority, and as the agent of the said defendant, indorsed the said note for and in behalf of the said defendant, by writing thereon the name of him the said John Shreve, as agent for said defendant."

Delany v. Corporation of Washington.

Mr. Worthington, for the defendant, objected to the note going in evidence.

The COURT, however, (*nem. con.*) overruled the objection, but intimated an opinion that if a verdict should be obtained on that count, the judgment might be arrested, as it did not appear by that count that the note was made payable to Shreve in the same capacity in which he indorsed it; so that it would appear to be a note payable to Shreve, but indorsed by Porter; and so no title in the plaintiff.

Mr. Marbury then contended that the defendant would be liable as drawer of a bill on Patterson, the maker, in favor of the plaintiff, and that Patterson would be considered as having accepted the bill.

CRANCH, C. J., suggested that Patterson could not be considered as the acceptor, because he promised to pay only to the order of Shreve in his individual character; and Shreve's order was not made in that character, but as agent of Porter.

Mr. Marbury then abandoned the count upon the note, and relied upon the count for goods sold and delivered to the defendant, and gave evidence that Commodore Porter was owner of the Union Steamboat; that Shreve was his agent for the management of that boat, which plied as a passenger boat between Georgetown and Alexandria; and that the plaintiff furnished articles for the use of the boat.

Verdict for the plaintiff, \$49.23.

SMOOT v. LEE.

In an action against the surety in a prison-bonds bond, the defendant will not be permitted to adduce evidence that the principal (the debtor) was insolvent, and therefore the plaintiff sustained no damage.

DEBT on a prison-bonds bond given by W. Wise, who broke the bounds.

Mr. Wallach, for the defendant, (the surety,) offered evidence to prove that Wise was insolvent when the bond was given; and therefore the plaintiff had suffered no damage by the breach of the condition of the bond.

But the COURT (*nem. con.*) rejected the evidence.

PAT. DELANY v. CORPORATION OF WASHINGTON.

Upon appeal from the judgment of a justice of the peace, for the penalty of a by-law.

 McGunnigle v. The Corporation of Washington.

the judgment will be reversed with costs, if the warrant does not set forth the offence with sufficient certainty.

A warrant, charging that the defendant "did during the last or present month, sell spirituous or other liquor without a license, contrary to the act, or acts of the mayor, &c., on that subject made and provided," is too vague and uncertain to support a conviction.

This was an appeal from the judgment of a justice of the peace for a penalty of \$20.

The warrant commanded the constable to take Pat. Delany, &c., to answer to the Mayor, Board of Aldermen, and Board of Common Council, &c., in a plea that he render to the said Mayor, &c., the full sum of \$20, which to the said Mayor, &c., "he owes and unjustly detains, for that he the said Delany did, during the last or present month, sell spirituous, or other liquor, without a license, contrary to the act or acts of the said Mayor, &c., on that subject made and provided."

Mr. Jones, for the appellant, contended that the offence is not set forth with sufficient certainty, and cited the case of *Barney v. The Corporation of Washington*, in this Court, at July term, 1805, (1 Cranch, C. C. 248.)

The COURT (THURSTON, J., *contra*,) decided that the warrant was too uncertain, and reversed the judgment with costs.

See also *White v. Corporation of Washington*, at October term, 1822, (*ante*, 337,) and *Boothe v. The Corporation of Georgetown*, at the same term, (*ante*, 356.)

 ANN MCGUNNIGLE v. THE CORPORATION OF WASHINGTON.

A warrant issued by a justice of the peace for the penalty of a by-law, ought to state all the circumstances required by the by-law to constitute the offence; but the Court will disregard all such defects as would be disregarded after verdict in an action of debt or information upon a penal statute.

FOUR judgments for \$20 each were rendered by a justice of the peace against the appellant, with costs, upon four separate warrants.

1. The first charged that she "did suffer or permit gaming in her house on the 31st of December, 1822, or the 1st of January, 1823, contrary to the act or acts of the said Mayor, &c., on that subject made and provided."

The second charged that she "did between the 28th of December, 1822, and the 18th of January, 1823, sell spirituous liquor, without having obtained a license from the register, contrary to the act or acts," &c.

The third charged that she "did, sometime in the last and present months, suffer gambling in her house, contrary to the act or acts," &c.

The fourth charged that she "did, during the present month, sell spirituous liquors by retail without having a license therefor, contrary to the act or acts," &c.

The by-law upon which the two prosecutions for gaming were founded, was that of the 16th of August, 1809, entitled "An Act to suppress gaming," by the 2d section of which, it is enacted, "That if any person or persons whatsoever, shall, after the passage of this act, permit any E. O., A. B. C., faro, roly-bolly, shuffle-board, equality table, or other device, except as aforesaid," (that is, except billiard-tables,) "to be set up, kept, or played, in his, her, or their house, out-house, tavern, or place appertaining thereto, he, she, or they shall incur the penalty of \$20 for every day or less time that the same is so kept up and maintained, to be recovered before a single magistrate, one half whereof shall go to the informer, and the other for the use of the city council."

The by-law upon which the two prosecutions for selling liquor was founded, was that of the 26th of October, 1819, by the 1st section of which it is enacted, that "it shall not be lawful for any person or persons to sell or barter any brandy, rum, gin, whiskey, or other spirituous liquors, mixed or unmixed, wine, cordial, strong beer, or cider, in the city of Washington, without first obtaining a license for that purpose, as required by law, and every person who shall sell or barter as aforesaid, without first having obtained a license therefor, shall forfeit and pay a fine, for each and every offence, of \$20; one half thereof for the use of this corporation, and the other half for the use of the informer; provided that nothing, herein contained, shall be so construed as to prevent the brewer, or maker of strong beer, cider, or cordial, from selling the same in quantities not less than five gallons, or to prevent any person from selling spirituous liquors, wines, cordial, strong beer, or cider, in quantities not less than ten gallons."

By the 2d section, the Mayor (not the register,) is authorized to issue licenses, &c.

The COURT (THRUSTON, J., absent,) decided that these four warrants were too vague and uncertain to support the judgments; and reversed them with costs. And the Court said, that the warrant, in such cases, for a penalty of a by-law ought to state all the circumstances which are required by the by-law to constitute the offence; or, in other words, the warrant must contain the charge of an offence. But the Court will disregard all such defects as would be disregarded, after verdict, in an action of debt, or information upon a penal statute.

TENCH RINGGOLD v. WILLIAM ELLIOT.

A judgment for the defendant in replevin, without a declaration, is irregular, and will, on motion, be set aside, even at a subsequent term.

DEBT on a replevin-bond, executed by the defendant as surety for Charles W. Patterson, in his replevin against the present plaintiff, Tench Ringgold.

The judgment was rendered upon a verdict for the then defendant Ringgold, at October term, 1823.

Mr. Redin, now, (April term, 1824,) moved the Court to set aside the judgment in the case of *Patterson v. Ringgold*. There had been a rule on the plaintiff to declare, but, without any declaration being filed, the parties went to trial at the last term, and a verdict and judgment rendered for the then defendant.

In the case of *Ault v. Elliot*, special bail for Peter Morté, at April term, 1823, this Court set aside the judgment against the principal, for irregularity, (there being no declaration,) although several terms had intervened. Such is also the practice in the English Courts. *Barlow v. Kaye*, 4 T. R. 688.

The surety in the replevy-bond cannot have a writ of error to the judgment in the replevin; and the sum is too small, if he could.

Mr. Redin also produced affidavits as to merits, and misinformation, and surprise of the defendant as to the action of replevin.

The COURT, on the 1st of June, 1824, ordered the judgment to be set aside, on payment of costs.

 UNITED STATES v. R. B. LEE.

A public officer who receives money in advance for the contingencies of his office, is a receiver of public money, within the meaning of the Act of Congress of the 3d of March, 1797.

THIS was a suit against the defendant, who was commissioner of claims under the Act of Congress of the 9th of April, 1816, § 11, [3 Stat. at Large, 261.]

Mr. Swann, for the United States, offered two accounts settled and certified by the proper officers of the treasury department, according to the act of 3d of March, 1797.

Mr. Jones, for the defendant, objected, because, as he contended, the defendant was not a receiver of public money within the meaning of that act.

The COURT said they had decided in the case of the *United*

Negro Tarlton v. Tippet.

States v. Benjamin King, at October term, 1822, (not reported,) that accounts, so certified, were evidence where the defendant was charged with money advanced to him by the United States, for which he was to account. In that case money had been advanced to King upon a contract for gun-locks.

The present defendant was commissioner of claims and received money in advance for the contingencies of his office, for which he is called upon to account.

 NEGRO FANNY TARLTON v. CARTWRIGHT TIPPETT.

If the owner of a slave in the county of Washington carries her to a foreign country with intent there to reside permanently, and does there reside with her for more than twelve months and is then compelled to quit that country, and returns to the county of Washington, bringing the slave with him there to reside, the slave, by such importation, becomes entitled to her freedom. But if the owner be sent to such foreign country as a special agent of the government of the United States, at a stated salary, with an uncertainty, depending upon contingencies, whether he should remain there or return after accomplishing the purpose of his mission, and is compelled to leave the country before he had actually settled himself as a permanent resident there, then the taking the slave with him and bringing her back, is not an importation against the Maryland Act of 1796, c. 67.

PETITION for freedom. Mr. Alexander Scott had been appointed by the President of the United States, an agent to Caraccas in South America. He went with an intention to remain permanently, if certain events should happen. He took the petitioner with him, and she remained there with him more than a year. The event not having occurred upon which his decision to reside there permanently was to be founded, he returned to reside here, and brought her with him.

Mr. Turner, for the petitioner, moved the Court to instruct the jury, that "if they should believe from the evidence that Mr. Scott, at the time of his leaving the District of Columbia, for Caraccas, meant permanently to reside there, with his family, and did so reside for upwards of twelve months, carrying with him and there retaining the petitioner; and that his leaving there was owing to compulsion and not to his will, then the petitioner is entitled to a verdict in her favor."

The COURT (MORSELL, J., *contrà*,) gave the instruction, whereupon *Mr. Jones*, for the defendant, prayed the Court to instruct the jury, "that if they find from the evidence that the said Scott proceeded to Caraccas in a public character on a secret mission for the government, and on a stated salary; that he also had some ulterior and contingent views of remaining longer at Caraccas than was necessary for the purposes of his mission, and of

Bank of Alexandria v. Clarke.

engaging there in business; but that when he departed from the district for Caraccas, the duration of his abode there and the business he should engage in, were undetermined and uncertain, and dependent upon circumstances; and that, at the time of his being compelled to leave Caraccas, he had not actually settled himself as a permanent resident there, but still remained there undecided as to the duration of his residence, or the footing on which he should establish himself, then the bringing the petitioner back from Caraccas to Maryland and from Maryland to this district, was not an importation against the Act of Assembly." Which instruction the Court gave, as prayed; (THRUSTON, J., dissenting.)

ROBERT CRITTENDEN v. PENDLETON STROTHER.

If the plaintiff examines his attorney as a witness, he waives his privilege, and upon cross-examination the attorney is bound to answer generally.

DEBT on bond. Plea — gaming debt.

Mr. Hall, the plaintiff's attorney, offered himself as a witness, and testified in behalf of the plaintiff.

Upon his cross-examination he objected to answer a question, claiming the privilege of his client.

The COURT said, that when his client examined him as a witness in his favor, he must be considered as waiving his privilege.

Verdict for defendant.

BANK OF ALEXANDRIA v. ED. W. CLARKE.

In an action by the indorsee of a promissory note against the maker, the indorser is a competent witness for the plaintiff, (without a release,) to prove an acknowledgment of the debt so as to take the case out of the statute of limitations.

The defendant said he thought the plaintiff had charged up the note to his account; if that was not the case he would "attend" to it; this is sufficient to rebut the plea of the statute of limitations.

ASSUMPSIT, by the indorsee against the maker of a promissory note for \$64.25.

A verdict was taken for the plaintiff "subject to the opinion of the Court, whether the deposition of C. Neale, the indorser of the note be admissible as evidence in this cause, without a release from the plaintiffs; and, if admissible, whether it be sufficient *per se* to take the case out of the statute of limitations. Judgment to be rendered for plaintiffs or defendant according to the opinion of the Court on the above points.

Munroe v. Cocke *et al.*

The COURT, at December term, 1824, (CRANCH, C. J., *contra*,) gave judgment for the plaintiffs. See *Barnes v. Ball*, 1 Mass. Rep. 73, and *Rice v. Stearns*, 3 Ib. 225; *Gaither v. Lee*, in this Court, at June term, 1820, (*ante*, 205,) and *Knowles v. Stuart*, at April term, 1824, (*ante*, 457.)

ROBERT MUNROE *v.* BULLER COCKE *et al.*

In order to obtain an attachment under the Maryland Act of 1795, c. 56, the affidavit must be positive as to the amount of the debt.

ATTACHMENT under the Maryland Act of 1795, c. 56.

The affidavit upon which the justice of the peace made his warrant to the clerk of this Court to issue an attachment, states "that Samuel Robertson, not being a citizen of the District of Columbia, and not residing therein, is *bonâ fide* indebted to him, the said Robert Munroe, the sum of \$2,053.37 over and above all discounts, and the said Munroe at the same time produces the account current which is hereunto annexed, by which the said Samuel is so indebted; and the said Robert likewise states that he hath drawn on the said Robertson for the sum of \$1500, and also for the sum of \$2,223.10, which drafts, though not due, the said Robert understands from the said Robertson, and verily [believes] will not be paid, and further, that the latter draft for \$2,223.10, hath never been accepted by the said Robertson, and the said Robert hath therefore allowed no credit or discount for said drafts. He further states that said Robertson informed him, some time ago, that he would be entitled to a charge against said Robert's account, for some loss that he expected would accrue in the sale of certain flour on their joint account; no account has been exhibited stating the amount of such loss, and therefore he hath allowed said Robertson, in stating his account, no credit."

The warrant of the justice of the peace to the clerk of this Court, says, "upon the receipt of this, together with the annexed proofs, you are required to issue an attachment against the goods and chattels, lands and credits of Samuel Robertson, and for so doing this shall be your warrant, as witness my hand and seal," &c. Upon the return of the writ of attachment,

Mr. J. Dunlop, for the plaintiff, moved for judgment of condemnation.

The COURT (*nem. con.*) was of opinion, that judgment could not be granted, on account of the uncertainty and irregularity of the affidavit and warrant. (Attachment quashed.)

Daniel Donoghue's Case.

THE BANK OF THE UNITED STATES v. WILLIAM ONEALE.

If a note is payable at a bank, it is a sufficient demand of payment of the maker, if the holder on the last day of grace, demands payment at the bank; and the note is dishonored if the maker has no funds there to pay it.

ASSUMPSIT against the indorser of Benjamin G. Orr's promissory note for \$7,660, due 26 - 29 May, 1821.

A verdict was taken for the plaintiffs, subject to the opinion of the Court, upon a case which stated that the note and signature of the parties was admitted; that Michael Nourse, a notary public, on the 29th of May, 1821, (the last day of grace,) at the request of the plaintiffs, presented at their office of discount and deposit in Washington, where the note was made payable, the original promissory note, and there demanded payment of the sum of money therein specified, whereunto the teller replied, that he had no funds, and that on the 30th of May, 1821, he gave notice personally to the defendant, that the said note had been protested for non-payment, and that he was held liable by the plaintiffs for the payment of the same.

That, on the 29th of May, 1821, Samuel J. Potts, the plaintiffs' book-keeper at their said office of discount and deposit, examined the account of the said Benjamin G. Orr, on the books of the said office on that day, and found no funds at his credit, but his account overdrawn.

And it was agreed that the note was discounted for the maker, at the plaintiffs' said office, on the day of its date, and was then delivered to them by the maker, indorsed by the defendant.

Upon the case thus stated, the COURT rendered judgment for the plaintiffs.

DANIEL DONOGHUE'S CASE.

If an insolvent debtor, upon allegations filed, be found guilty of having disposed of his property with intent to defraud his creditors, he will be ordered into close custody, and precluded from any benefit under the Insolvent Act.

ALLEGATIONS were filed by *Mr. Wallach*, for a creditor of Daniel Donoghue, (who had applied to be discharged under the 7th section of the insolvent act,) charging that the petitioner had disposed of his stock of goods with intent to defraud his creditors. Having been found guilty by a jury,

The COURT ordered him into close custody, and adjudged that he should be precluded from any benefit under the Act, June 1, 1824.

WALTER NEWTON'S CASE.

Upon trial of the issue upon allegations filed against an insolvent debtor, it is incumbent upon the persons filing the allegations, to show that they are creditors of the insolvent.

After the jury is sworn, the Court will not permit the allegations to be amended by inserting the name of another creditor.

The judgment upon verdict against the debtor, is, "that he be precluded from any benefit under the Act entitled," &c.

WALTER NEWTON had applied to one of the judges of this Court on the 19th of February, 1822, to be discharged under the Insolvent Act of the 3d of March, 1803, [2 Stat. at Large, 237,] and obtained his discharge on the 4th of March, 1822.

Mr. Key, in behalf of Ann Key and Bernard Spaulding, claiming to be creditors of Newton, on the 17th of February, 1824, filed allegations against him, charging,

1. That by a deed to Clement Newton, dated December 5th, 1821, he had conveyed away a large part of his property with intent to defraud his creditors.

2. That by the said deed he had assigned and conveyed the property therein mentioned, with intent to give a preference to the said Clement Newton as a creditor or surety of the said Walter Newton.

3. That he had disposed of a cart with intent to defraud his creditors.

After the jury was sworn to try the issues joined upon these allegations, *Mr. Jones*, for the defendant, objected that *Mrs. Key* and *Mr. Spaulding* were not creditors.

Mr. Key contended that it was too late to make the objection after the jury was sworn.

Mr. Jones. The proceeding up to the time of joining issue is *ex parte*. It is a summary proceeding, and the forms of pleading are dispensed with. The objection as to the time of calling upon the plaintiffs to show their right to question the validity of the defendant's discharge, rests only upon the technical rule of formal special pleading. But such technical rules do not apply to this summary trial. The plaintiffs must show their right to file allegations, and to call upon the debtor to answer them.

The COURT (THRUSTON, J., *contrà*.) decided that the plaintiffs must, as part of their title to litigate, show that they were creditors of the debtor at the time of his discharge. The plea of not guilty, obliges the plaintiffs to make out their right to sue.

Mr. Key then asked leave to insert, in the allegations, the name of another creditor; one whose name had been returned as a creditor in the debtor's schedule.

The COURT (MORSELL, J., *contrà*,) was at first inclined to grant the leave, but upon further argument and reflection, refused. (THRUSTON, J., *contrà*.)

Mr. Key, saying that he did not anticipate such an objection, asked for time till to-morrow to show that Mrs. Key and Mr. Spaulding were creditors of Newton at the time of his discharge.

The COURT (MORSELL, J., *contrà*,) granted Mr. Key's request.

The jury, on the next day, found the defendant guilty, and the COURT ordered the following entry to be made on the minutes: "Whereupon it is considered by the Court, that the said Walter Newton be precluded from any benefit under the Act entitled, 'An Act for the relief of insolvent debtors within the District of Columbia.'"

CIRCUIT COURT OF THE UNITED STATES.

MAY TERM, 1824, AT ALEXANDRIA.

UNITED STATES *v.* ALEXANDER CARNOT.

The owner of the goods stolen, after having released to the United States and to the prisoner, all his interest in the fine, is a competent witness for the United States, and may be examined generally.

A foreigner in Virginia is entitled to a jury *de medietate lingue*.

Bank notes are not goods and chattels, and cannot be the subject of larceny at common law.

The prisoner was indicted at common law, for stealing certain bank-notes, the property of W. B. Stewart, to wit, two bank-notes of the Bank of Virginia, and one ten-dollar bank-note of the Bank of the United States.

W. B. Stewart, the owner of the notes, was called to testify for the United States, and stated that he had collected \$95, which he had laid by in his desk to pay a particular debt; that he had not seen it for two or three days, when, going to his desk, he missed \$60. That he asked his wife, who denied she had taken it, and said it must have been taken by the Frenchman, (meaning the prisoner.)

The Court here interposed and stopped the witness, and asked if it was agreed that he should be examined generally.

Mr. Taylor, for the prisoner, objected to the witness because he was entitled to one half of the fine which the Court might impose.

Mr. Swann, the district attorney, obtained a release from the witness to the United States, and to the prisoner of all right to the fine; and the Court permitted the witness to be examined generally.

Mr. Ramsay, for the prisoner, in argument to the jury said that the prisoner might have required a jury *de medietate lingue*.

The Court (THURSTON, J., absent,) intimated a doubt upon that point, as it was not allowed in Maryland.

Mr. Herbert afterwards produced "The Richmond Inquirer," of November 4, 1823, Vol. XX., No. 52, in which it is stated

that in the case of the *United States v. Manuel Cartacho*, in the Circuit Court of the United States, before Mr. C. J. Marshall, and Judge St. George Tucker, "The Court, according to the motion of the prisoner's counsel, directed the discharge of the jury that had been previously summoned, and that a new array should be impanelled, one half of which to be foreigners, who were not citizens of the United States."

See also the Revised Code of the Virginia laws, p. 101, § 13, that "*juries de medietate lingue* may be directed by the courts respectively."

Verdict, guilty.

But the COURT (THRUSTON, J., absent,) arrested the judgment, upon the authority of the case of the *United States v. Bowen*, at April term, 1817, (*ante*, 133,) bank-notes not being goods and chattels at common law.

JAMES B. BEVERLEY v. PETER R. BEVERLEY.

When a place of payment is inserted in the body of a promissory note, it is not necessary, in an action by the payee against the maker, to prove a demand of payment at the place named in the note.

DEBT upon a promissory note made by the defendant to the order of the plaintiff for \$150.33, at ninety days, dated at Alexandria, (D. C.) August 21, 1822, payable in the Union Bank of Georgetown. The declaration, which was in debt, after setting out the note, avers that the defendant did not, ninety days after the date of the note, pay to the order of the plaintiff, in the Union Bank of Georgetown, the said sum of \$150.33, whereby action accrued to the plaintiff to demand and have of the defendant the said sum of \$150.33; yet, though often requested, the defendant hath not paid the same, nor any part of it to the plaintiff, &c., but refuses, &c., to the damage of the plaintiff, \$100, &c. Judgment was confessed by the defendant, with leave to move the Court to strike it out.

Mr. C. C. Lee, for the defendant, now moved to strike it out, contending, that when a place of payment is inserted in the body of the note, a demand of payment at that place is necessary, in order to put the maker in default, and give the plaintiff a right of action.

The declaration avers that the defendant promised to pay in the Union Bank, but does not aver that payment was ever demanded in that bank. Pothier on Obligations, 139; Chitty on Bills, 321, Am. ed.; *Sanderson v. Bowes*, 14 East, 500; *Borro-*

daile v. Middleton, 2 Camp. 549; *Beaux v. Howes*, 5 Taunt. 130, 139; Com. Dig. tit. Condition, G. 9, pl. 4; 1 Saund. 32; *Morton v. Lamb*, 7 T. R. 125; *Roche v. Campbell*, 3 Camp. 247; *Nichols v. Bowes*, 2 Ib. 498; *Foden v. Sharp*, 4 Johns. 183; *Lang v. Brailsford*, 1 Bay's Rep. 222.

Mr. Mason, contra. When shall the demand be made, at or in the bank? The plaintiff was not obliged to demand payment the moment the note was payable. He may yet demand it there. If the plaintiff's cause of action does not accrue until the plaintiff shall have so demanded payment, the statute of limitations has not yet begun to run upon this note. Judge Dade, in Virginia, decided that such a demand was not necessary to charge the maker, who is liable everywhere, and at all times, within the time of limitation.

The COURT overruled Mr. Lee's motion, and refused to set aside the judgment.

See *Ruggles v. Patten*, 8 Mass. Rep. 480; *Herring v. Sanger*, 3 Johns. Ca. 71; *Woodbridge v. Brigham*, 12 Mass. Rep. 403; *Berkshire Bank v. Jones*, 6 Ib. 524; 1 Saund. 33; *Carter v. Ring*, 3 Camp. 459; *Capp v. Lancaster*, Cro. Eliz. 548; Co. Lit. 210 b; Com. Dig. tit. Condition, G. 9.

THE FARMERS BANK OF ALEXANDRIA v. ISAAC ROBBINS, Trustee of Amos Alexander.

The judgment-lien upon the lands of an insolvent debtor is not destroyed by the 5th section of the Insolvent Act, although there is no process of execution thereupon, in the hands of the marshal, at the time of the debtor's application for relief, under the act.

UPON the motion of the Farmers Bank of Alexandria, a rule was granted them against Isaac Robbins, trustee of Amos Alexander, an insolvent debtor, to show cause why he should not pay to that bank, out of the moneys arising from the sales of the real estate of the said Amos Alexander, in his hands, as trustee, the balance due to the bank upon a judgment obtained against him by the bank, and which was in full force and effect when he took the oath of insolvency.

By the 5th section of the Insolvent Act of 1803, it is provided, "That the product of the insolvent's estate, after satisfying all incumbrances and liens, shall be divided among the creditors, in proportion to their respective claims; and that no process against the real or personal estate of the debtor, shall have any effect or operation, except process of execution and attachments in the nature of executions, which shall have been put into the hands of

the marshal antecedent to the application, that is, the application for relief under the act."

Mr. Taylor, for the defendant, in showing cause, contended, that liens and incumbrances are of two kinds. 1st. Specific, attaching on certain designated portions of property, and arising from contract, either expressed or implied from the usage of trade, known to the parties, and therefore still deriving their origin from contract; such are mortgages, deeds of trust, pledges or pawns of personal property, claims of workmen for work done on personal property remaining in their hands, advances by factors or agents, &c. 2d. Liens, not forming a subject of stipulation or agreement between the parties, and not deriving their origin from express or implied contract, but given by law, as incidental to contracts under certain circumstances. These are mostly, if not always, general, affecting all a debtor's property, or all of a particular class. These are remedies to enforce the performance of a duty, and not strictly rights.

As to the first class of liens, deriving their force from the voluntary and legal contract of the parties, it would, on principle, have been incorrect for Congress to have interfered with them, so as to impair their obligation. But as to the second class, which were given by the legislature as a remedy, it was certainly competent for the legislature, when public expediency required it, to take them away, either wholly or partially, by a general, or partial repeal of the law by which they were given, as in its wisdom it might think right. The 5th section of the act seems to have done so in the case of insolvency and application for relief under that act.

Although Congress has not defined the liens and incumbrances which are to be paid, it has clearly defined those which shall not be paid. No process against the real or personal property of the debtor is to have any effect, &c. If there be no process to enforce the lien by judgment, there is an end of it.

The liens which are protected by the act, are the specific liens arising directly from contract.

The liens erected against the estate, generally, by judgment or execution, are lost by insolvency. *Thellusson v. Smith*, 2 Wheat. 396, 423; *Sturges v. Crowninshield*, 4 Ib. 121.

Mr. Swann, *contra*, contended that the 5th section of the act did not destroy the lien of judgments, and only modified the remedy by which the benefit of the lien is to be obtained, by substituting a sale by the trustee, in place of a sale by the marshal, under an execution, in all cases where there was not an execution in the hands of the marshal at the time of the insolvent's application for relief under the act.

Gardner v. The Columbian Insurance Company.

The trustee is to sell the whole property, and distribute the proceeds among the creditors, having respect to all liens and incumbrances.

The COURT (*nem. con.*) was of opinion that the lien of the judgment was not destroyed; that the Insolvent Act only substituted the trustee for the marshal, as to the sale, and that, in the distribution of the proceeds of the sale of the real estate, he should have regard to the judgment, as a lien.

 RICHARD GARDNER v. THE COLUMBIAN INSURANCE COMPANY.

In an action upon a valued policy on a cargo, the defendants will not be permitted to give evidence of its actual cost.

The policy was on a voyage "at and from Rio Janeiro to Santos, and two ports in South America, and at and from either of them to a port of discharge in the West Indies, or Europe, or the United States," upon goods "at and from Rio Janeiro," "until they shall be safely landed at Santos, &c., &c." "valued at the sum insured," (*viz.* \$3500,) "on her cargo of salt, and on the proceeds, as interest may appear." These words do not justify an inference, on the part of the underwriters, that the goods were to be laden on board at Rio Janeiro.

The cargo was lost between Rio Janeiro and Santos, and the plaintiff recovered for the loss, although the cargo was laden at Cadiz.

This was an action upon a policy for \$3500, on a cargo of salt in the brig *Manufactor*. The terms of the policy are stated above in the marginal note.

Mr. Taylor, for the defendants, contended, that, by the terms of the policy, the salt was to be taken on board at Rio Janeiro, whereas it was laden on board at Cadiz, in Spain; which fact was not disclosed to the underwriters; and that this was a material misrepresentation, which vacated the policy.

He also contended, and offered evidence to prove that the cargo cost, at Cadiz, only \$450, whereas it was valued in the policy at \$3500; and that this was so gross an over-valuation as to authorize the defendants in considering it as an open policy.

But the COURT (*nem. con.*) refused to admit evidence of the actual value at Cadiz.

As to the first misrepresentation, *Mr. Taylor* cited *Marshall on Insurance*, 321, 322; *Murray & Ogden v. The Columbian Insurance Company of New York*, 11 Johnson, 302.

Mr. Mason, for the plaintiff, contended that the words of the policy did not imply that the salt was to be taken on board at Rio Janeiro; and every person trading to that port knows that salt cannot be taken on board there, by an American ship, and carried to Santos, which would be a prohibited coasting trade. The defendants were bound to know the laws and usages of the

Howland v. The Marine Insurance Company of Alexandria.

trade. *Bell v. Hodgson*, 3 Camp. 272, and S. C. 16 East, 241; *Phillips on Insurance*, 169.

The COURT (*nem. con.*) was of opinion that the words of the policy did not justify an inference on the part of the defendants that the goods were to be laden on board at Rio Janeiro, and that the salt was covered by this policy, although not laden, nor bulk broken, at Rio.



THOMAS H. HOWLAND v. THE MARINE INSURANCE COMPANY OF ALEXANDRIA.

The mere stranding of a ship on a bar will not, of itself, justify the abandonment of the ship to the underwriters, but the master and crew are bound to use their best exertions to get her off.

If the stranding were produced by the want of skill on the part of the master, or by the want of that degree of care and prudence which a skilful and prudent master of such a vessel would exercise in similar circumstances, or, if after she was stranded he neglected to use all reasonable means to save her, the loss is not covered by the policy; but if the captain and crew were competent, and all reasonable care was used to avoid the accident, and all reasonable exertions were used, honestly, and with good faith, to prevent the wreck and destruction of the property, and it was, nevertheless, lost, then the loss is within the policy.

If the stranding was of such a character, as to render it, in the exercise of good judgment, hopeless to get the vessel off, then the abandonment was justified, and the loss was within the policy.

If the bar, on which a vessel is stranded, is out of the due course of the voyage insured, and the deviation were voluntary, or produced by want of skill in the navigation of the ship, or by want of that degree of care and diligence on the part of the master and crew, which a prudent and skilful master and crew would use in like circumstances, the insurers are discharged.

The Court will not instruct the jury upon a question of art depending upon nautical skill, and upon which the Court could not give an opinion without consulting persons skilled in nautical matters.

The question of negligence of the master of a vessel in conducting the voyage is to be left to the jury under all the circumstances of the case as they appear in evidence.

Upon a valued policy, by which, "T. H. H. on account of himself and J. J." caused a ship to be insured by the defendants in the sum of \$10,000, T. H. H. may alone maintain an action, in his own name, and recover judgment for the whole amount insured, although the declaration avers that the plaintiff and the said J. J. were interested in the ship to the amount insured.

This was an action upon a policy for \$10,000 on the ship *New Jersey*, valued at the sum insured, on a voyage to and from Liverpool to Alexandria, by which policy "Thomas H. Howland, on account of himself and John Jackson," caused insurance to be made, &c., and the declaration, which was in the name of T. H. H. alone, averred that the plaintiff and the said John Jackson were interested in the ship to the amount insured, and that in the prosecution of her voyage she was stranded on the 10th of August, 1820, and totally lost by the perils of the sea. On the 10th of August, she stranded on Southampton bar, on the shore of

Howland v. The Marine Insurance Company of Alexandria.

Long Island; the cargo was taken out, and she floated over the bar into the inlet between the bar and the shore of Long Island, where it was found so difficult to get her off, and she was supposed to be in so dangerous a situation as to justify her sale for the benefit of all concerned. She was sold for \$1,000, and in less than a week was totally destroyed by a storm. She was abandoned to the underwriters, of which they had notice on the 17th of August.

The defence set up was negligence and want of skill in the master, and want of proper exertions to get the ship off.

The COURT, (THRUSTON, J., absent,) on the prayer of the defendant's counsel (*Mr. Swann* and *Mr. Jones*), instructed the jury, that the mere stranding or grounding of the ship on the bar, was not, of itself, a loss or accident which justified the abandonment of the ship; but the master and crew were bound to use their best exertions to get her off and save her, notwithstanding such accident; that if the stranding were in the first instance produced by the want of skill or care of the master; or if, after she was stranded, he neglected to use the proper and necessary means and exertions to save her from consequent wreck and destruction, then the loss is not within the policy, and the plaintiff is not entitled to recover.

The COURT, also, at the prayer of the plaintiff's counsel (*Mr. Wirt*), instructed the jury, that if they should be of opinion from the evidence, that the stranding of the ship was of such a character as to render it, in the exercise of good judgment, hopeless to get the vessel off, then the said abandonment was justified, and the loss is within the policy. That the master and crew of the said vessel, were, after she was stranded, bound to use their best exertions to get her off. That if the stranding were produced, in the first instance, by the want of skill on the part of the master, or by the want of that degree of care and prudence which a skilful and prudent master of such a vessel would exercise in similar circumstances; or if, after she was stranded he neglected to use all reasonable means and exertions to save her from consequent wreck and destruction, the loss is not within the policy, and the plaintiff is not entitled to recover; but if the captain and crew were competent, and all reasonable care was, in the first place, used to avoid the accident, and, after it occurred all reasonable care and exertions were used honestly and in good faith to prevent the wreck and destruction of the property and to save it for the benefit of the concerned, and it was, nevertheless, lost, then the loss is within the policy, and the plaintiff is entitled to recover.

The COURT, also, on the prayer of the defendants, instructed the jury, that if the bar, on which the ship was stranded, was out

of the due course of the voyage insured, and the deviation were either voluntary or produced by the want of skill in the navigation of the ship, or by the want of that degree of care and diligence on the part of the said master and crew which a prudent and skilful master and crew of such a vessel would use in like circumstances, the insurers are discharged.

Mr. Jones, for the defendants, then prayed the Court to instruct the jury, that if the master and crew, with such assistance as was offered and might have been obtained from the shore, could, by discharging the cargo, have got the ship over the bar, or if there was a reasonable prospect of so doing, they were bound to have made the experiment of so lightening the ship before they proceeded to dismantle her and treat her as irrecoverably lost; and if, in fact, it be found that the ship did float over the bar, and was safely anchored within, as soon as she was unloaded, and was then sold at auction for \$1,000 and upwards; and if, in that situation it be found that the chances of saving her would have been increased by having kept her equipments on board, and by having preserved her in the best order for sailing that was practicable under all circumstances without dismantling her, then the jury may, and ought to presume that the loss was produced by so dismantling her before or at the time of unloading her; unless the jury shall be satisfied by the evidence, that it was, under all circumstances, impracticable to have retained her sails, rigging, tackle, and furniture on board, or such of her tackle and equipments as were necessary to enable her to put to sea and make a safe port, and that the stripping her of such equipments was, under all circumstances necessary to the preservation of the ship, or ought, under all circumstances to have been presumed by the master, in the exercise of a sound discretion, to have been necessary to that end.

But the COURT, (*nem. con.*) refused to give the instruction, having already instructed the jury, in effect, that the master and crew were bound to exercise that degree of care, skill, and diligence in the navigation of the said ship, and in the circumstances in which she was stranded, which a prudent and skilful master and crew of such a vessel would have exercised in like circumstances; and because the Court is required to instruct the jury upon a question or act depending upon nautical skill, upon which the Court could not give an opinion without consulting persons skilled in nautical matters.

Mr. Swann, for the defendants, then prayed the Court to instruct the jury, that if, from the evidence, they should be satisfied that no survey was had, or requested to be had by the master of the said ship while she was upon the bar, and that if they should

be further satisfied from the evidence that the master had been advised that she might be gotten off at an expense of one or two hundred dollars, and that assistance had been repeatedly offered to him to get her off from the bar into the open sea, then the omission of the master to make the said attempt was evidence of negligence on his part sufficient to justify the jury in finding a verdict for the defendants.

But the COURT (THRUSTON, J., absent,) refused to give the instruction; being of opinion that the question of negligence was a question to be left to the jury under all the circumstances of the case as they appear from the evidence.

Verdict for the plaintiff for the amount insured.

Mr. Swann, for the defendants, moved in arrest of judgment,

1st. Because the suit was brought in the name of Thomas H. Howland, for his individual use, upon a policy set forth in the declaration for the joint benefit of him and John Jackson; and

2d. Because the verdict has given the whole amount of the sum insured upon a declaration in which it is apparent that the plaintiff was entitled to but one half.

3. Because the suit is misconceived; it appearing by the declaration that the contract was a joint, and not a separate contract.

Mr. Swann also moved for a new trial on the ground that the verdict was against the weight of evidence, and because it was for the whole amount insured.

But the COURT (THRUSTON, J., absent,) overruled both motions.

UNITED STATES v. BETSEY WARE.

It is good cause of challenge, in a capital case, that the juror is a quaker, and has conscientious scruples as to the lawfulness of taking away human life for any offence.

BETSEY WARE, a free colored woman, was indicted for burglary in the dwelling-house of E. J. Lee, Esq. Two of the jurors, W. Stabler and George S. Hough, when called to be affirmed, stated in open court that they were of the Society of Friends, and had scruples of conscience in regard to the lawfulness of capital punishment; and did not, in their conscience, think it lawful to take the life of a human being.

Mr. Hewitt, for the prisoner, objected that the jurors could not challenge themselves.

Mr. Taylor, for the United States, (in the absence of the District Attorney,) then challenged them, for cause, alleging that they did not stand indifferent.

The COURT said it was good cause of challenge, and the jurors were set aside.

Zantzinger v. Weightman.

W. P. ZANTZINGER v. R. C. WEIGHTMAN *et al.*

In an action for maliciously holding the plaintiff to bail upon a *ne exeat*, for a larger sum than was due, the Court will grant a new trial if the verdict for the plaintiff is against the weight of evidence.

In granting a new trial for the defendant, the Court will make it a condition that the verdict shall stand until another shall be rendered.

The Court will not permit evidence to be given of the private opinion of the witness as to the fraud or fairness of the plaintiff's conduct, derived from facts which appeared before the witness as an arbitrator.

The *ex parte* deposition of a deceased witness, not taken by consent, cannot be read in evidence.

In an action for maliciously holding the plaintiff to bail upon a *ne exeat*, the plaintiff may give evidence that he has suffered in the public estimation in consequence of the process of *ne exeat*, but not in consequence of reports circulated by the defendant, although such reports may be given in evidence by the plaintiff to show malice in the defendant; nor can he give evidence of special damage not averred in the declaration.

The plaintiff, in such an action, must show both malice and the want of probable cause, and that the defendants knew that they had not probable cause.

The bill and affidavit and the order of the judge granting the *ne exeat*, are *prima facie* evidence of probable cause.

A *ne exeat* bond only binds the sureties to the extent of the final decree of the Court; and if the defendant continually remains in the district, according to the condition of the bond, they will be discharged altogether.

The declaration, in such an action, must aver the want of probable cause; and for want of such averment the judgment will be arrested.

This was an action upon the case for maliciously holding the plaintiff to bail, upon a *ne exeat*, for a much larger sum than was due.

The declaration states that the defendants, "maliciously and injuriously" intending to cause the plaintiff "to be, unjustly and without any probable cause, arrested and imprisoned for a large sum of money," and to cause him, "without any just or reasonable cause, to expend divers large sums of money on that occasion;" "did falsely, unjustly, and maliciously file a bill of complaint," &c., "whereupon they prayed a certain process called a *ne exeat*, and an account; and although the plaintiff has never been indebted to the defendants at any time in a larger sum than \$3,531.75, yet the defendants, by certain false statements in their said bill, and in the affidavit accompanying it, procured the aforesaid process called a *ne exeat* to be issued, and an indorsement thereon from one of the judges of the said Court requiring the plaintiff to give bond in the sum of \$16,000, conditioned," &c., by reason of which said process, so indorsed, he was, "by the unjust and malicious procurement of the defendants arrested and imprisoned," &c., whereas, in truth and in fact, the plaintiff was not at the time of issuing the said process, and at the time of the imprisonment, &c., indebted to the defendants in more than \$3,531.75, which fact has been so found by arbitrators,

&c.; "nor was his conduct such as to justify or require the extraordinary process of *ne exeat*; by reason whereof," &c.

At November term, 1821, the jury found a verdict for the plaintiff, with \$2,000 damages; but the COURT, (THRUSTON, J., not giving any opinion,) upon the defendants' motion granted a new trial, upon payment of costs, and upon condition that this verdict should stand until another should be rendered, agreeably to the practice in the English courts; this Court being of opinion that the verdict was against the weight of the evidence.

The cause came on for trial again at November term, 1822, when the COURT (THRUSTON, J., absent,) refused to permit a witness (Mr. Davidson) to state his opinion as to the fraud or fairness of the plaintiff's conduct, derived from the facts which appeared before him, as an arbitrator.

The COURT also refused to permit H. C. Wilson's deposition to be read, (he having died since the last trial,) not being satisfied that it was taken by consent; and knowing that it was objected to, at the last trial, on that ground, and that in consequence of that objection Mr. Wilson was then brought into Court.

The plaintiff's counsel asked a witness (Mr. Munroe,) whether the character of the plaintiff had suffered in the public estimation in consequence of the process of *ne exeat*, and the proceedings thereon.

The COURT permitted the question to be put; but did not permit the witness to be asked whether he had heard injurious reports of the plaintiff's conduct from the defendants, and whether the plaintiff did not suffer in reputation in consequence of such reports; but said that the plaintiff, in order to prove malice, might give evidence of the declarations of the defendants.

The COURT also refused to permit the plaintiff to give evidence of special damage resulting from the reports in circulation, in consequence of the *ne exeat*, (that is, that the plaintiff was nominated to an office by the President, and that the character of the plaintiff was injured in the opinion of the Senators by those reports,) the same not having been specially averred in the declaration.

The COURT gave the same instructions to the jury which they had given at the former trial; which were, in substance, that the plaintiff must show both malice, and the want of probable cause. That the award of the arbitrators is not proof of the want of probable cause. That there must have been, not only the want of probable cause, but the defendants must have known that there was not probable cause. That the bill, and affidavit, and order of the judge, are *primâ facie* evidence of probable cause.

The COURT, also by the assent of both parties, instructed the

jury that the *ne exeat* bond would only have bound the sureties to the extent of the final decree of the Court, and that if the defendant should have remained in the district, according to the condition of the bond, the sureties would have been discharged altogether.

The jury again found a verdict for the plaintiff and \$2,000 damages.

Mr. Taylor and *Mr. Jones*, for the defendants, moved in arrest of judgment;

1. Because the plaintiff has not alleged, in his declaration, that the writ of *ne exeat* was, in fact, sued out without probable cause.

2. Because the plaintiff's own declaration shows that there was sufficient probable cause for suing out the said writ.

3. Because the plaintiff does not show by his declaration that proceedings on the *ne exeat* were at an end.

1st. There is no direct averment, in the declaration, of the want of probable cause. The only part of the declaration in which it is mentioned is in the indictment, where it is said that the defendants, "intending to cause the plaintiff to be unjustly, and without probable cause, to be arrested," &c., "did, falsely, unjustly, and maliciously, file a bill, &c., and procure a *ne exeat*, &c., which is not an averment that the defendants filed the bill and procured the *ne exeat* without probable cause." *Johnson v. Sutton*, 1 T. R. 544, 784; *Reynolds v. Kennedy*, 1 Wils. 232. The inducement could not be traversed.

2d. The declaration shows good cause of arrest to the amount of \$3,531.75; and that there is no averment of the want of probable cause as to the excess of bail required. "Falsely, unjustly, and maliciously," are not a sufficient substitute for an averment of the want of probable cause. *Ennis v. Millman*, 3 Call, 3; *Young v. Gregory*, 3 Call, 446; *Kirtley v. Deck*, 2 Mun. 10.

3d. The third objection (that is, that the plaintiff does not show in his declaration, that proceedings upon the *ne exeat* were at an end,) is fatal upon general demurrer, and equally so in arrest of judgment.

Mr. Jones, on the same side. When the declaration admits a probable cause of holding to bail to a certain amount, and the *gravamen* is the holding to excessive bail, the excess must be averred to be without probable cause. *Lilwell v. Smallman*, Selw. N. P. 946, 1056; *Savil v. Roberts*, 1 Salk. 13; S. C. 1 Ld. Raym. 374; *Farmer v. Darling*, 4 Burr. 1971. Malice cannot be inferred, but must be averred and expressly proved. *Gibson v. Charters*, 2 Bos. & Pul. 129; *Purcell v. Macnamara*, 9 East, 361; *Sinclair v. Eldra*, 4 Taunt. 7. Upon the third objection,

he cited *Pritchard v. Brisco*, Doug. 215; *Morgan v. Hewes*, 2 T. R. 225.

Mr. Hewitt, contrâ. The recital may be carried into the substantial averment; as the county named in the margin will supply the want of naming it in the averment. The gist of this action is the procuring an extraordinary process of the Court upon false suggestions or statements.

As to the third objection, he referred to *Young v. Gregory*, 3 Call, 446. But the declaration does show that proceedings upon the *ne exeat* were at an end, by averring that the award of the arbitrators was affirmed by the final decree of the Court.

In the cases cited there was no such argumentative averment of the want of probable cause as there is in this. The averment that the plaintiff's conduct was not such as to justify or require the extraordinary process of *ne exeat*, is tantamount to an averment of the want of probable cause.

For the general definition of an action for a malicious prosecution, he referred to Esp. N. P., and *Daw v. Swaine*, 1 Sid. 424; and as to what defects are cured by verdict, he referred to 2 Saund. 228; *Jackson v. Burleigh*, 3 Esp. Rep. 34; and the statute of jeofails of Virginia, pp. 111, 112; and the Judiciary Act of the United States, of 1789, § 32, [1 Stat. at Large, 73.]

Mr. Swann, on the same side. "Without probable cause" are not technical words, which cannot be supplied by equivalent expressions. *Young v. Gregory*, 3 Call, 446. "Want of probable cause" is necessary in a suit for a vexatious criminal prosecution, but not for a vexatious civil suit. If the whole declaration be taken together the inference is irresistible that the *ne exeat* was procured and the excessive bail required without probable cause.

Mr. Hewitt, cited Read's Pleader's Assistant, p. 30, which is the precedent he followed, and which does not aver the want of probable cause. He also cited 1 Chitty, 230, 292, 308, as to the distinction between inducement and averment.

The COURT (THRUSTON, J., absent,) having fully considered the case, arrested the judgment, because there was no averment of any act done by the defendants without probable cause; and because, by the plaintiff's own showing, there was probable cause to a certain extent.

JOSEPH SMITH v. CREASE'S EXECUTORS.

If a creditor, having the bond of his debtor with a surety, takes a new security payable at a day beyond the time of payment of the bond, without the consent of the surety, with the understanding that he was not to trouble the principal for the

money, unless the new security should prove to be good for nothing, the surety is discharged, and his remedy is in equity.

THIS was a suit in equity, in which the plaintiff stated that he was surety for Thomas Mount, in two single bills for \$1000 each, dated in July, 1815; one payable with interest on the 1st of July, 1817, and the other on the 1st of July, 1818, to Anthony Crease, the defendant's testator; and when he thus became surety, he took a deed of trust upon the property of Mount for his indemnification. That the first of the bills having become payable, and remaining unpaid; and before the second had become payable, the creditor, Anthony Crease, without consulting the plaintiff, took from Mount an assignment of one J. W. Bronaugh's bond for \$2000, to one Richard Weedon, who had assigned it to one John Mount, who had assigned it to the said Thomas Mount; which bond was payable on the 1st of March, 1819, eight months after the last of the bills in which the plaintiff was a surety, and was to be held by Crease as a collateral security for Mount's debt; that is to say, the said Anthony Crease was "to use due diligence to collect the said debt of the said J. W. Bronaugh, and if the same was not collected, your orator did suppose that resort was to be had to the said Thomas Mount, and the other assignors of the said bond." That when the plaintiff was informed of this arrangement, he considered himself released from his responsibility, and gave up to the said Thomas Mount the lien which he held for his indemnification. That Crease obtained judgment against Bronaugh upon the bond, but he never paid it, and was discharged under the insolvent act. That Crease did not bring suit against the assignors. That after this arrangement, Crease never set up any claim against the plaintiff for Mount's debt, and died in September, 1820, leaving the plaintiff under a belief that he was no longer liable for the debt; but that his executors have obtained judgment at law against him upon the bills, and will enforce the same unless restrained, &c.

The defendants, in their answer, deny that Bronaugh's bond was received in payment of the debt of Mount, or on any other terms than as a collateral security. They deny that their testator agreed, or bound himself to wait the result of the collection of Bronaugh's bond; or in any manner precluded himself from proceeding against Mount and his surety whenever he pleased, on their original obligations.

They deny that the plaintiff took the deed of trust for his indemnity when he became surety for Mount, and that his supposed exoneration was the motive for his release of his lien upon Mount's property.

Smith v. Crease's Executors.

In order to account for not having brought suit against the assignors of Bronaugh's bond, they say they have been informed that John Mount and Richard Weedon are insolvent. They also say that they have returned Bronaugh's bond to Thomas Mount.

The deposition of Thomas Mount was taken, in which he says, that, "as he" (Mr. Crease) "appeared uneasy, I told him I would give him this bond," (that is, Bronaugh's bond,) "with the understanding that he was not to trouble me for the money without this bond should prove good for nothing, to which he agreed, and took the bond, and accordingly never did ask me for any part of the principal afterwards."

The receipt given by Mr. Crease for Bronaugh's bond was as follows: "Memorandum, Received, Alexandria, 3 April, 1818, of Mr. Thomas Mount, J. W. Bronaugh's bond, assigned by Richard Weedon to John Mount, and by John Mount to Thomas Mount, for \$2000, which I hold as collateral security for moneys due me. Anthony Crease. Said bond becomes due, 1 March, 1819."

The cause having been set for decree by consent, and submitted to the consideration of the Court (in the absence of THURSTON, J.) during the vacation,

MORSELL, J., at November term, 1849, after stating the case, delivered the opinion of the Court, as follows:—

Although the testimony of Mount is thus let in, it would be still insufficient, unless fortified by strong and pregnant circumstances, being contradicted by the oath of the defendants. Let us, then, examine what the circumstances are. Was there any previous engagement on the part of Mount to give this additional security, at the time it was given, for any other and different consideration? None such appears in the proof in the case. In the absence of all proof on the subject, what is the common and ordinary understanding in a case where the bond of another man is assigned as such collateral security? Is it not universally and invariably implied that he shall use all necessary and legal steps to obtain payment from the obligor, (unless insolvent) first, and before he proceeds against the assignor? And does not the law raise such an implied condition? But this is a stronger case than the ordinary; for the bond of Bronaugh thus received, had actually a considerable time to run, beyond the time when both the notes would fall due, before it could even be demanded. Can it be supposed for a moment, that it was not understood between the parties, that Crease should at least indulge Mount on the bills until Bronaugh's bond should become due, so that it might be ascertained whether that obligation would be paid or not? And what has been the conduct of Crease and his executors? Have

they not actually waited, and indulged Mount for years after the bills became due, and until after the suit against Bronaugh had been prosecuted to a stage conclusively to show that no fruits were to be had from the judgment; that Bronaugh was a bankrupt; their own actions thus strictly corresponding with what Mount states to have been the agreement.

It does seem to me, therefore, that these circumstances are strong and pregnant, and completely fortify and establish Mount's testimony. Before, however, the legal effect is considered, I will notice some other parts of the case.

1. As to the time which was suffered to elapse between the time when the bills became due, and that of suits being brought against Mount and Smith; I should say that mere delay to call on the principal debtor, or mere forbearance to sue him would not amount to a discharge of the surety, unless gross laches were proved. I am not prepared to say that the negligence in this case did amount to such gross *laches*.

2. As to what is stated in the answer to have taken place between one of the defendants and the complainant, Smith, shortly before the bringing of the suit against him, the negotiation and the offer appear to have taken place with a view to prevent suit being brought, and in a spirit of compromise; and there does not appear to have been any such clear binding promise or engagement on the part of Smith, as to revive and set up the claim, if the same was, at the time, extinguished as to him, and which will now be considered by applying the law to what appears to be the proof in the case.

The law, as clearly laid down and settled, will, I think, be found to be this:—The surety being importantly interested in the contract, or agreement, there should be no transaction with the principal without acquainting him therewith. The original implied contract is, that as far as the nature of the original security will admit, the surety, paying the debt, shall stand in the place of the creditor; so also the surety has a right, the day after the bond is due, to come into a court of chancery and insist on its being put in suit against the principal debtor; and finally the law seems to be clear, that if a creditor agree with his debtor to postpone the day of payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged, even although the change should be for his advantage.

The last consideration will be, that admitting the arrangement thus to have operated a discharge, is the complainant in time, and before a proper court, with his defence? Should not such a defence have been set up to the action at law? especially as to

Negro Alice v. Mortè & Edelin.

the single bill which had not fallen due at the time of the agreement? On this point, I confess I have felt considerable difficulty in the course of my examination into the subject. I have found the American authorities differing, some being on one side, and some on the other. The English authorities are pretty clear that the chancery forum is the proper one; and I incline to think so also.

Let the decree, therefore, in this case, be for the complainant, making the injunction perpetual. The authorities relied on are, 7 Bacon, 506; 10 Johns. 180, 587; 6 Ves. 734; 18 Ves. 21; 2 Ves. 540.

 NEGRO ALICE v. PETER MORTÈ & S. EDELIN.

A slave who has been manumitted, and lost her deed of manumission, may have relief in equity.

THE complainant, Alice, was a mulatto woman, who was claimed by the defendant, Peter Mortè, as his slave, and who was about to be carried away into the southern States, when she claimed her freedom, and complained to Mr. Hoffinan, a justice of the peace, who, under a statute of Virginia, in force in the county of Alexandria, detained her, and committed her to the marshal for safe keeping, until her complaint could be heard by the Court, the defendant, Mortè, having refused to give security for her forthcoming to prosecute her claim at court. Having been brought before the court by *habeas corpus*, and having filed her petition to be permitted to sue *in formâ pauperis*, Mr. Mason was assigned by the Court as her counsel, who reported in favor of her claim in equity; whereupon she filed her bill in equity, in which she stated that she was formerly held as a slave in Maryland, by one Samuel Edelin, in whose family she continued till she was sixteen years of age, and where she was kindly treated. That Edelin was an unmarried man, and about five years ago gave her what she supposed was a deed of emancipation, and was suffered by him to go at large, as a free person, which she did for some time, in his immediate neighborhood, with his knowledge and approbation; that with his knowledge, she then went and resided in Washington, D. C., where she continued unmolested until the year 1819. That she lost her paper which was given to her by Edelin, when she was discharged from his service, and which she is informed and believes was a full and sufficient deed of emancipation. That she was lately seized, thrown into jail, and sold to the defendant, Peter Mortè, who was in-

United States *v.* Murdoch, Youille *et al.*

formed of her claim to freedom, and who is about to remove her to some part of the southern or western country.

This bill was sworn to by the complainant. The defendants demurred "as to so much of the complainant's bill as seeks to charge them with a knowledge of her right to freedom, or as seeks to compel the defendants or either of them to make any discovery touching the same, or any of the matters relating thereto, in the bill suggested or alleged;" "and for cause of demurrer show, that they ought not to be compelled to discover any matters whereby they may impeach or accuse themselves of an offence or crime for which they may suffer corporal punishment; or be grievously fined."

The COURT, at May term, 1824, after argument, overruled the demurrer, and ordered the defendants to answer on or before the first day of the next term. Not having done so, and the complainant having filed the deposition of John B. Edelin, fully confirming the facts stated in the bill, it was taken for confessed, and

The COURT decreed that the complainant should be emancipated and set free, and that the defendant, Edelin should make, execute, and deliver to her a proper and full deed of emancipation, duly prepared for record; and that the defendant, Morté, should be perpetually enjoined from exercising, or in any manner setting up any claim to the complainant.

UNITED STATES *v.* MURDOCH, YUILLE *et al.*

The United States have no specific lien on imported goods, for the duties, after having taken bond and security therefor, and delivered the goods to the consignee. The consignee is to be considered, under the sixty-second section of the Collection Act of 1799, as the owner. The consignor never was debtor to the United States for the duties.

BILL in equity by the United States, against Murdoch, Youille, Wardrope, & Co. of Madeira, and James H. Hooe, administrator of William Hodgson, deceased. It charges that M., Y., W., & Co. shipped certain casks of wine to Hodgson in his lifetime, either on consignment, or as a sale to him. That Hodgson gave bond and security for the duties, upon which judgment was recovered by the United States against Hodgson in his lifetime, and remained in full force until his death. That the defendant J. H. Hooe took letters of administration on his estate, (no execution having been levied upon his property to secure the debt,) and obtained possession of his personal estate, and effects, among which is the very wine upon which the duties accrued; and that whether the wine belongs to M., Y., W., & Co. or to W. Hodg-

son's estate, the United States consider it liable for the duties, and that it may be subjected to the payment of the judgment against Hodgson, &c. The defendants, M., Y., W., & Co. answered, that William Hodgson was only their agent, and had no interest but in his commissions upon the sales of the defendants' wines. That in the year 1818, they shipped to him a cargo of wine by the brig Hebe, part under special orders procured by Mr. Hodgson, and part for sale generally for account of these defendants. That Mr. Hodgson secured the duties to the satisfaction of the United States, on that part of the cargo which was shipped upon their account, and which was thereupon delivered to him; and that the duties upon the residue of the cargo were secured by the persons upon whose orders it was shipped, and it was delivered to them. That Mr. Hodgson had charged these defendants with \$518, being the amount of the duties which he had secured upon that part of the cargo consigned to him by these defendants for sale. That after allowing him credit therefor, he died indebted to these defendants in the sum of \$1,679.45, which yet remains unpaid. They deny that the United States have any lien upon the wine for the duties after they have been secured, and the wine delivered.

The answer of Mr. Hooe admits that sundry casks of wine came to his possession as administrator of Mr. Hodgson, upon which the duties had been secured by him in his lifetime but not paid; but that when the duties were secured to the satisfaction of the collector, the wine was delivered to the consignees.

Mr. Taylor, for the defendants, contended that the lien of the United States upon the wine ceased with their possession, and cited the opinion of Mr. Justice Story in the case of *United States v. Lyman*, 1 Mason's Rep. 482.

He also contended, that for all the purposes of paying or securing the duties, the importer or consignee was, under the sixty-second section of the collection law of 1799, [1 Stat. at Large, 673,] to be considered as the sole owner of the goods imported, and alone responsible for the duties.

The words of that clause of the section are as follows: "And to prevent frauds arising from collusive transfers, it is hereby declared, that all goods, wares, or merchandise imported into the United States shall, for the purposes of this act, be deemed and held to be the property of the persons to whom the said goods, wares, or merchandise may be consigned, any sale, transfer, or assignment, prior to the entry and payment or securing the payment of the duties on the said goods, wares, and merchandise, and the payment of all bonds then due and unsatisfied by the said consignee, to the contrary notwithstanding."

 Bank of Alexandria v. Deneale's Executrix.

Mr. Swann, contra, contended that the owner of the wine was debtor to the United States for the duties, and that this proceeding was in the nature of a chancery attachment of their effects in the hands of their agent, or his personal representative, the defendant, Mr Hooe, as garnishee; Mr. Hodgson was the factor and agent of the defendants, Murdoch, Youille, Wardrope, & Co.; and their effects in his hands were liable to attachment for their debt. Although the consignee, for the purpose of giving bond and security for the duties, may be considered as the debtor of the United States, yet he is not the only debtor. He was only their agent, and although he may be bound himself, yet he bound his principal also, who must see that his agent discharges his bond.

Upon a reference, by consent, to a master commissioner, a balance of \$1,679.45 was found due from Hodgson, at the time of his death, to the defendants, Murdoch, and others, and the cause having been set for hearing upon the bill, answers, and report of the master commissioner,

The COURT (THRUSTON, J., absent,) was of opinion, that by taking the bond and security for the duties, and the delivery of the wine to the consignees, as mentioned in the bill and answers, the United States have relinquished their specific lien on the wine; and that, under the sixty-second section of the collection law of 1799, the consignee is to be considered, for the purposes of that act, as the owner of the wine; and that the consignors are not, and never were, debtors of the United States for the duties thereon; and if they were to be considered as the original debtors of the United States for those duties, yet, that that debt was extinguished by the taking of the bond and security, and prosecuting the same to judgment, and delivery of the wine; there being no evidence of any fraud in the case.

It is therefore decreed and ordered, that the complainants' bill be dismissed.

The complainants prayed an appeal, but never prosecuted it.



THE BANK OF ALEXANDRIA v. GEORGE DENEAL'S EXECUTRIX.

A party to a note discounted at a bank, is not bound by the special and particular usage of such bank, unless upon his agreement, express or implied.

Upon a prayer for instruction to the jury, the Court, in considering the question whether the jury can, from the evidence, infer the facts necessary to justify the instruction prayed, must decide in the same manner as they would upon a demurrer to evidence, and will consider all those facts as proved which the jury could legally infer from the evidence.

But upon the question whether the instruction prayed be justified by the facts stated in the prayer, the Court is bound to decide upon those principles which ought to go-

Bank of Alexandria v. Deneale's Executrix.

- vern them in deciding upon a special verdict. The ultimate facts upon which the party relies must be expressly and absolutely stated. The Court can infer nothing.
- If a case cannot be brought within the special usage of the bank, it must be governed by the general law of the land; and by that law the indorser is not liable, unless demand of payment be made upon the maker of the note.
- By the law merchant the rights and obligations of the parties to a negotiable bill or note are as precisely ascertained as if they had been expressed in so many words. The obligation of the indorser is an express, not an implied obligation. It is conditional, not absolute. No parol agreement, made at the same time with the written agreement, can alter or control its legal import; nor can evidence of such parol agreement be admitted.
- In a case stated, the Court cannot infer any fact as they may upon a demurrer to evidence.
- An understanding and expectation of the parties, does not, in a special verdict, or case stated, amount to a finding of an agreement.

ASSUMPSIT, against the executrix of the indorser of a promissory note for \$1000, made by one James Deneale by his attorney in fact, the defendant's testator, George Deneale, payable to the said George Deneale and by him indorsed to the plaintiffs, by whom it was discounted, and the proceeds placed to the credit of the maker, James Deneale. It was dated at Alexandria, on the 16th of June, 1818, and payable sixty days after date. No place of payment was stated in the note. James Deneale, the maker of the note, resided at Dumfries in Virginia, about twenty-five miles from Alexandria, and had never resided in Alexandria. George Deneale, who was his brother, resided in Alexandria. On the 18th of August, 1818, (being the 3d day of grace,) the notary employed by the bank, put a letter into the post-office at Alexandria directed to the said James Deneale at Dumfries, informing him that the note was due. George Deneale died on or about the 2d of July, 1818, before the note became payable. Notice of non-payment of the note was given to the defendant, his executrix, on the 19th of August, 1818.

On the trial, the plaintiffs offered evidence that the bank did not demand payment from the makers of promissory notes, discounted by the bank, if the makers resided out of the town, and not in any town where a bank was established. That when a note is not paid by three o'clock on the last day of grace, it is delivered to a notary public, who, if the maker lives out of town, states that fact in his protest, and gives notice to the indorser, and returns the protest to the bank; and that this practice of the notary, and of the bank, was generally known to the dealers in the Bank of Alexandria.

That some of the preceding notes of the same series had been protested in the same manner, and judgments had been confessed by the said James Deneale as maker, and by George Deneale as indorser; and that new notes had been given for the judgments.

The power of attorney from James Deneale to George author-

Bank of Alexandria v. Deneale's Executrix.

ized him to sign notes for him to be negotiated in the Bank of Alexandria, and to renew the same from time to time.

Mr. Taylor, for the plaintiffs, prayed the Court, in effect, to instruct the jury that if they should believe, from the said evidence, that it was the known and established usage of the banks in Alexandria to make no demand of payment on non-resident drawers of notes discounted in those banks, but to call upon and give notice to the resident indorsers of such notes; and that the note in question was indorsed by the said George Deneale with the understanding and expectation that if not duly paid by the maker, it was to be sent out from the bank to the notary and by him proceeded with conformably to the said usage, and in all respects as it was treated; and with the understanding and expectation that no further or other steps of diligence were, in that case, to be pursued by the bank for making demand of payment of the said note, or giving notice to the indorser of the non-payment of the same, than as aforesaid, then it is not necessary, in order to charge the defendant, as executrix of the said George, in this action, upon his indorsement aforesaid, to prove that any demand of payment of the said note had been made on the said James Deneale.

CRANCH, C. J., delivered the opinion of the Court as follows, (THRUSTON, J., absent.)

The Court refuses to give the instruction prayed by the plaintiff's counsel.

1st. Because the evidence does not support the hypothesis upon which the instruction is prayed; and

2d. Because the hypothesis, if true, will not justify the instruction.

1. The hypothesis requires a known and established usage of the banks in Alexandria, to make no demand of payment on non-resident drawers of notes discounted in those banks; and a like usage of the banks to call upon and give notice to the resident indorsers of such notes.

The evidence is, that it had never been the usage of the banks to demand payment from the non-resident drawers of discounted notes, but "that the universal usage of the banks was to deliver such notes to the notary public, on the day they fell due, if not paid in banking hours, without any special instructions or directions to the notary, expecting him to do his duty."

The bank, then, had no usage on the subject of demand and notice in such cases, but depended upon the notary to do his duty according to law; leaving the responsibility with him, and, no doubt, holding him responsible if he did not. There is no evidence of any usage of the bank to call upon and give notice to

the resident indorsers of such notes. Whatever may have been the usage of the notary, it was not the usage of the bank.

2. The hypothesis requires that the note should have been indorsed by George Deneale (the defendant's testator) with the understanding and expectation that if not duly paid by the drawer, it was to be sent out from the bank to the notary, and by him proceeded with conformably to the usage before described, and in all respects as it was treated.

Before the Court can give the instruction prayed, they must be satisfied that the jury can, from the evidence stated, infer the facts which constitute the hypothesis upon which the instruction is prayed. That question must be decided in the same manner as the Court would decide upon a demurrer to evidence, and the Court will consider all those facts as proved which the jury could legally infer from the evidence taken altogether; for, in the present case, according to the prayer, the jury is to believe all the evidence to be true. If, then, from the whole evidence stated, the jury cannot infer that the note was indorsed by the defendant's testator, with the understanding and expectation, that if not duly paid by the drawer it was to be sent out from the bank to the notary and by him proceeded with conformably to the usage stated, and in all respects as it was treated, the Court cannot give the instruction.

From an attentive consideration of the evidence as stated, the Court is of opinion that the jury cannot legally draw the inference required by the hypothesis. For if the jury should draw the inference that the usage existed and was known to the defendant's testator at the time of his indorsing the note, yet from the whole evidence as stated, the jury might and ought to infer that the said note was drawn with the understanding and expectation that payment thereof, when due, should be demanded of the said George as the attorney and agent of the said James; and the circumstances which induce the Court to think that such is the inference which the jury ought to draw, are the following:

1st. The power of attorney from James Deneale to George Deneale, dated October 13, 1800, lodged in the Bank of Alexandria before the drawing and indorsing of any of the said notes, by which the said George is authorized to draw notes in the name of the said James, negotiable in the Bank of Alexandria, and to draw and renew them from time to time, for the accommodation of the said James.

2d. That the bank notices which are usually sent by the bank, to the makers of discounted notes, informing them of the time when their respective notes would become payable, were, in regard to the previous notes drawn by the said George as attorney

of the said James, and discounted by the said bank, sent to the said George; and that the said George, as agent and attorney of the said James, had usually paid, or provided the means of retiring the same.

3d. That whenever any of the preceding notes were protested, (and it was only in those cases that a formal demand became necessary; for in all other cases the notes were taken up before the expiration of the last day of grace,) payment thereof was first demanded of the said George, as agent of the said James, the drawer thereof; and that the said George never objected to such demand of payment so made upon him as agent of the said James; but in one instance confessed judgment in an action brought against him as indorser of one of the said preceding notes, of which payment had been demanded of him as agent of the said James as aforesaid, and paid, or provided the means of retiring the others.

4th. That evidence was given that it was the invariable custom of the notary in all cases of notes discounted in the banks in Alexandria, to give notice on the last day of grace to the non-resident drawer by the mail of that day if the note came to his hands in time for the mail; if not, by the mail of the succeeding day, that such was due, and in his hands for protest; but that, in regard to such of the said preceding notes as had been protested, no such notice was given, because payment had been demanded of the said George as agent of the said James, the drawer thereof.

These circumstances and acts of the parties, are all inconsistent with the usage attempted to be proved in cases of non-resident drawers; and there is no evidence of any act done by any of the parties in reference to such usage, except this, that after the said George's death, the notary put a letter into the post-office at Alexandria, on the 18th of August, after the mail of that day for Dumfries had been closed, addressed to James Deneale, (the maker of the note,) at Dumfries, informing him that the note was due, and in his hands for protest. This act may have been done, by the notary, in compliance with the supposed usage, but is no evidence that the note was indorsed in reference to such usage; and if the note was not indorsed in reference to such usage, the hypothesis is not supported, and the instruction cannot be given.

3. The hypothesis further requires that the note should have been indorsed by the defendant's testator, with the understanding and expectation, that no further or other steps of diligence were, in that case, to be pursued by the said bank for making demand of the said note, or giving notice to the indorser of the non-payment of the same, than those stated in the description of the usage.

The argument which shows that the jury cannot infer that the note was indorsed in reference to the usage, shows that they cannot infer that it was indorsed with an understanding and expectation that no further steps of diligence should be pursued by the bank. If the note was indorsed with the understanding that payment thereof, when due, should be demanded of George as agent of James (the maker,) then it could not have been indorsed with an understanding that no further or other steps of diligence should be pursued than those stated in the description of the usage, because such demand is not required by the usage.

But it has been said that even if the note was indorsed with an understanding that payment should be required of George as agent of James, yet, as, by the death of George (which was the act of God,) it became impossible to demand payment from George, the bank is justified by its usage in not making any demand of payment from the maker of the note.

But it is only by the agreement and consent of the parties that the usage of the bank can have any effect; and no agreement is stated in the hypothesis, or in the evidence, that in case of George's death before the note should become payable, demand of payment from the maker should be dispensed with. If the case cannot be brought within the special usage of the bank, it must be governed by the general law of the land; and by that law the indorser is not liable unless demand of payment be made of the maker of the note. The defendant is not bound by the special usage, unless at the time of indorsing the note, her testator agreed to be so bound; and there is no evidence of a special custom, that if it be agreed at the time of indorsing a note, that payment shall be demanded of the agent of the maker, and if the agent should die, before the day of payment, then no demand of payment should be made from the maker himself.

For these reasons we think the hypothesis not justified by the evidence.

2. The second reason for refusing to give the instruction is, that it is not justified by the hypothesis. As, in considering the question whether the hypothesis was justified by the evidence, the Court was bound to decide according to the principles which ought to govern them in deciding upon a demurrer to evidence, so, in considering the question whether the instruction is justified by the hypothesis, the Court is bound to decide upon those principles which ought to govern them in deciding upon a special verdict. The ultimate facts, upon which the party relies, must be expressly and absolutely stated. The Court can infer nothing. Nothing can, by inference, be added to the hypothesis.

It is a serious question how far the special customs or usages

of a bank or banker can limit, extend, or define the obligations and rights of the respective parties to a negotiable instrument which happens to be, or was originally intended to be, discounted by such bank or banker.

We put out of the question all those special contracts which are made in reference to any particular trade, where the contracting parties are supposed to know the course and usage of such trade, and to have contracted in reference thereto; and all those contracts upon the face of which there is an ambiguity; and all contracts not negotiable, in which the assignee takes the paper subject to all its equity.

This is the case of an instrument negotiable by the statute, or by the law-merchant; and by that law, which is only a branch of the common law, (Carth. 269; 1 Show. 127, 318; 12 Mod. 15; 1 Lord Raym. 175; 6 Mod. 29; 2 Burr. 1226, 1228; 3 Burr. 1667; Hale, Hist. Com. Law, 24, 25; 1 Bl. Com. 7, Christ. note;) the rights and obligations of the parties are as precisely ascertained as if they had been expressed in so many words. *Furnum v. Fowle*, 12 Mass. Rep. 92; 13 Mass. Rep. 558; *Rowe v. Young*, 2 Brod. & Bing. 184, Judge Best's opinion; and *Id.* 204, Burrough's opinion in the House of Lords. The obligation of the indorser is, that he will pay the money if the maker do not pay it when due, provided it be duly demanded of the maker, and due notice be given to the indorser of such demand and non-payment. It is an express, not an implied contract. It is conditional, not absolute.

We do not know that it has ever yet been decided that the custom or usage of a bank can convert the conditional obligation of an indorser into an absolute obligation; nor do we know that it has yet been adjudged that parol evidence can be received to contradict the legal import of a written contract. The indorsement is a written contract. Its words are "Pay the contents to A. B. or order." The legal import of that contract is perfectly ascertained, and is, as before stated, a conditional obligation to pay the money.

Has any case yet gone the length to say, that parol evidence may be given to show that, at the time of the indorsement, the indorser agreed, by parol, that he would be absolutely bound to pay the money at all events? Our own decision, in the case of *Renner v. The Bank of Columbia*, has been pressed upon us, and it comes with tenfold weight since it has been affirmed by the Supreme Court, at its last term, (February, 1824.) 9 Wheat. 581.

But in that case, the evidence of the usage of the banks to demand payment of, and protest, notes, and give notice to indorsers

Bank of Alexandria v. Deneale's Executrix.

on the day after the last day of grace, was received without objection; and the object of the evidence was not to contradict or to vary the terms, or the legal import of the contract, but to ascertain whether due diligence had been used in making the demand, and giving notice of non-payment. What is due diligence, is a question compounded of fact and law. It depends very much upon the distance of the parties, the course of the mail, the usage of the post-office, and of bankers and mercantile men, and many other circumstances, all of which depend upon evidence. No material part of the contract was to be altered or varied by the evidence offered in that case. It was not, as in the present case, to change entirely the nature of the contract, and make that absolute which was only conditional. If the legal import of the contract of the indorser had been written out *verbatim*, "I will pay this note, if the maker, upon due demand, do not, and I have due notice," would the Court have permitted evidence to be given, that, at the time he wrote and signed the contract, he declared, that, notwithstanding the express words which make the contract conditional, he would absolutely pay the money without any condition? A party may waive a condition inserted for his benefit, but this waiver must be a subsequent act. You may then give evidence of it, because such evidence could not contradict the original written contract; but you cannot give evidence that, at the time of executing the instrument, the contract was different from what it imports to be upon its face. No rule of law is better settled than this.

In all the cases which we have seen, in which the usage of banks has been permitted to be given, in evidence, in actions upon negotiable instruments, the object has been to show, and bring home to the defendants the particular usage of the bank in relation to a matter left undecided by the legal import of the contract, and which depended upon usage, namely, the time and mode of the demand and notice necessary to charge the indorser. The law-merchant, as a general law, only requires that the demand and notice should be in reasonable time. What is a reasonable time has not yet been decided by any rule applicable to all cases. What may be reasonable, in some circumstances, may not be reasonable in others; and it is competent for the parties, at the time of making the written contract, to agree, verbally, respecting those matters which are not provided for by that contract. In the cases to which we allude, the judges have been careful to recognize the rule, that the legal import of a written agreement cannot be contradicted or varied by parol, and say that the admission of the parol evidence offered, does not violate that rule, because it is to prove a parol agreement respecting matters not provided for by the written agreement.

In the case of *Jones v. Fales*, 4 Mass. Rep. 251, which is the strongest case cited by the Supreme Court of the United States, in their opinion, in the case of *Renner v. The Bank of Columbia*, the point of law decided was, that, "if the defendant, when he indorsed these notes, agreed that, if the notes should be lodged in any bank in Boston, for collection, and if the bank should, according to its usage, notify the promisor, on the first day of grace, that the notes would be due on the last day of grace, and should request him to make payment, and should, afterwards, on the last day of grace, notify the defendant, the indorser, that the notes were not then paid, that he would be answerable on his indorsement," he was bound by his agreement, and could not require that the demand should be made in any other form, or at any other time.

Here, it will be perceived that the parol agreement was respecting a matter not provided for by the written, namely, the mode and time of the demand. It is intimated, by the court, that the condition of demanding payment of the maker, is a condition implied by law, for the benefit of the indorser. But the condition is no more an implied condition than the obligation of the indorser is an implied obligation; and parol evidence might as well be given to prove that, when he indorsed the note, he denied that he was bound, in any event, to pay the money, as to prove that he waived the condition, which was an original and essential part of the agreement. Mr. C. J. Parsons says, "Evidence of this kind, and for this purpose, is not to establish new law, but to prove that the defendant has waived a condition implied by law for his benefit, and has consented to other terms, to which, without question, he might have expressly agreed." But it does not follow, because a man might have expressly agreed to other terms, that you may give parol evidence that he did consent to other terms than those expressed in his written agreement, according to its legal import. If the court meant to say that parol evidence may be given to contradict the legal import of the contract of indorsement of a negotiable instrument, we cannot concur with them; and as the case before them did not require them to go so far as that, we do not think that they intended it. But before we can give the instruction now prayed, we must go to that extent. The usage would convert the conditional into an absolute obligation to pay the money, at all events. The note would, in effect, become joint and several, and the transaction, instead of being a mercantile discount, would be a direct loan, and the bank, by taking interest in advance, would be chargeable with usury. It is only by maintaining the negotiability of the note, and proving the transaction to be what it purports to be, that the bank can avoid the

charge of usury. The usage, of which evidence is offered, contradicts all that part of the transaction which discriminates it from a direct loan, and, therefore, would so materially vary the original written contract, that the admission of such evidence would be inconsistent with the rules of evidence and the principles of law to which we have before adverted.

In the case of *The Lincoln and Kennebeck Bank v. Page*, 9 Mass. Rep. 159, cited, also, in the opinion of the Supreme Court, in the case of *Renner v. The Bank of Columbia*, the parol evidence offered was not that demand and notice were entirely dispensed with by any usage or stipulation, but "modified as to time and manner." However broadly, therefore, the court has laid down the doctrine upon which they decided the cause, the case itself is within the limit within which we think the doctrine ought to be circumscribed; that is to say, that, although the parties have entered into a written agreement, yet parol evidence may be given of a parol agreement, made at the same time, in relation to circumstances not provided for in the written contract, but not to contradict or vary the terms of the written contract itself. The case of *Renner v. The Bank of Columbia* goes no further. The principal question in that case was, whether demand and notice on the day after the last day of grace, was sufficient to charge the indorser of a promissory note. Evidence of the usage of the banks was received without objection, and, under that usage, the knowledge of which was brought home to the defendant under such circumstances as justified an inference of his assent to it, the verdict and judgment were for the plaintiff. Whatever inferences may be drawn from the reasoning of the court, in that case, we do not think ourselves justified in extending the doctrine further than the case itself will warrant.

We are therefore of opinion that no parol agreement, made at the same time with the written agreement, can alter or control its legal import, and that no evidence of such a parol agreement can be admitted. If we do not stop here, we know not to what extent the doctrine contended for may not be carried.

If the particular usage of any individual banker, or even of a bank, through whose hands a negotiable paper may have passed, is to control the rights and obligations of the parties, no man can be safe in receiving or passing away such paper. Courts and merchants have been, for ages, endeavoring to ascertain and fix, with precision, the rights and obligations of the parties to negotiable instruments, and it is highly important that they should be settled. But the doctrine contended for, will make every thing depend upon local or individual usage. It will produce a state of uncertainty which will lead to endless litigation.

The instruction which the Court is required to give to the jury is, that it is not necessary, in order to charge the defendant, as executrix of the said George, in this action, on his indorsement aforesaid, to prove that any demand of payment of the said note, had been made on the said James, provided the jury should believe the evidence stated, and should therefrom draw the inferences stated in the hypothesis.

Primâ facie, the bank was bound to make demand of payment from the maker. Nothing could excuse them from making it but the agreement of the indorser to waive it. No direct evidence of such an agreement is stated, nor is the fact stated by way of inference in the hypothesis; but evidence is stated, from which it is supposed, by the plaintiffs, that the jury may, and ought, to infer that fact. Unless the jury find that fact, the instruction cannot be given—yet that fact is not contained in the statement of facts upon which the law is supposed to arise.

An understanding and expectation that the note would be treated as it was, is something short of an agreement that it should be so treated. Connected with other circumstances, it may be evidence of such an agreement, but it is not the agreement itself, and the Court cannot, upon a case stated, infer any fact as they can on a demurrer to evidence. Every prayer to the Court to instruct the jury is grounded upon a supposed finding of facts by the jury; and before the Court can say what the law would be upon such a finding, they must consider the facts as found.

The same rule, therefore, is to be applied to the hypothetical statement, as to a special verdict. The Court can draw no inferences of fact. Every thing relied upon must be explicitly stated. The fact of the agreement to waive the demand not being anywhere stated, and the Court being of opinion that the evidence will not warrant the jury in inferring that such an agreement was made by the defendant's testator, we cannot give the instruction prayed.

The jury found a verdict for the defendant.

The plaintiffs' counsel took a bill of exceptions, but did not prosecute a writ of error.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1824, AT ALEXANDRIA.

THOMAS JANNEY & Co. v. JOSEPH SMITH.

A claim, which has been pleaded or offered in evidence as a set-off, and rejected by the verdict of the jury, will not maintain an action.

ASSUMPSIT, for the defendant's proportion of one Johnson's expenses in Tennessee, upon a certain business. Plea, *non assumpsit*, and issue.

The defendant showed that the plaintiffs had offered and submitted this claim to the jury in bar of a former action brought by this defendant, Smith, against these plaintiffs, Thomas Janney & Co., and that the jury did not allow it.

Mr. Swann, for the defendant, contended that the plaintiffs are bound by that verdict, and cannot set up the claim again as a substantive cause of action.

Mr. Hewitt, contra. In the case of *Scott v. English* in this Court, after the jury had rejected Scott's claim of set-off, he brought a suit upon it and recovered. The principle that multiplicity of action is to be prevented does not apply; for no former suit has been brought upon it.

Mr. Swann, in reply. In the case of *Scott v. English*, the objection was not taken.

The COURT (THRUSTON, J., absent,) decided, and instructed the jury that if they should be satisfied by the evidence, that the present claim of the plaintiffs had been set up and insisted upon by the present plaintiffs as a set-off in the former action of Smith against them, and that it was not afterwards withdrawn by them from the consideration of the jury, before they retired to consider of their verdict, and they gave a verdict upon the whole matter; that verdict was conclusive against the plaintiffs in the present action.

EDWARD S. LEWIS v. THE FIRE INSURANCE COMPANY.

The Court has a discretion, upon a motion to change the venue, and will not, in general, change it, unless the suggestion be accompanied by an affidavit stating the grounds of belief, that an impartial trial cannot be had in the county in which the suit is instituted.

BEFORE the Court had made the rule (of 1821,) respecting applications for a change of venue, *Mr. Jones*, for the plaintiff, had, as he stated, moved the Court to change the venue in this cause, upon an affidavit stating no reasons for the plaintiff's belief that he would not have a fair trial in this county. The affidavit was handed to the Court without being filed, and remained in the drawer of the chief judge. The Court did not decide upon the motion, at the term in which it was made; and at the subsequent term, the affidavit not being found among the clerk's papers, it was supposed to be lost. After the Court had made the rule (of 1821,) requiring a statement of the reasons for the belief, &c., the affidavit was found and filed, and several terms elapsed without renewal of the motion.

Upon the motion being now renewed, CRANCH, C. J., said, that heretofore, and before the rule was made, it had been a prevailing opinion that the Court had no discretion, but was bound to change the venue, if the party would make oath that he believed he could not have a fair trial in the county. But a majority of the judges had decided that the Court had a discretion; and that if the Court had a discretion to change the venue or not, he could not consent to change it in any case upon a naked affidavit of the belief of the party, without stating the reasons of that belief.

MORSELL, J., was still of opinion that the Court had no discretion, and that the venue should be changed.

THURSTON, J., being absent, the motion to remove the cause did not prevail.

NOTE. The words of the Act of Congress of the 24th of June, 1812, § 8, [2 Stat. at Large, 755.] entitled "An Act to amend the laws within the District of Columbia," are, "That in any civil suit or action at law, or any criminal or penal prosecution by information or indictment now depending, or hereafter to be commenced, the Court, upon a suggestion in writing by any of the parties thereto, supported by oath or affirmation, that a fair and impartial trial cannot be had in the county where such suit or action is depending, may order the same suit or action to be removed into the Court holden in the other county in the said dis-

 William Devaughn's Case.

trict; and the same shall be prosecuted and tried according to law, and the judgment carried into full effect."

The rule of Court, referred to, requires that the affidavit of the party should state the grounds of his belief, and be corroborated by the affidavits of others.¹

 UNITED STATES *v.* GEORGE MILBURN.

Upon the trial of an indictment for offering a bribe to a witness, the previous declarations of the defendant of his motives for offering it, cannot be given in evidence by the defendant.

Mr. Taylor, for the defendant, offered evidence that Milburn, before the offer of the bribe, said he intended to offer it, to show how easily the witnesses might be bribed, so as to discredit them, not intending to pay the bribe.

But the COURT (THRUSTON, J., absent,) rejected the evidence.

 WILLIAM DEVAUGHN'S CASE.

A witness before the grand jury, is bound to answer a question, although he makes oath that he cannot answer it without criminating himself.

WILLIAM DEVAUGHN was sworn as a witness to the grand jury, who asked him whether he saw John Ball gaming at Mrs. Garner's. He refused to answer, saying that he could not answer the question without criminating himself. This was stated to the Court, by the grand jury, in writing.

The COURT (THRUSTON, J., absent,) decided, under the authority of this Court, in the case of *United States v. Miller*, at October term, 1821, [*ante*, 247,] that he was bound to answer the question,

¹ "May term, 1821. Rule as to the removal of causes under the Act of Congress. 1. The application shall be made, and affidavit filed on or before the first day of the trial court, or four days before the day assigned for the trial of the cause. 2. The affidavit of the party applying for the removal shall state the reasons of the belief of the party, that he cannot have a fair trial in the county wherein the suit is depending; and must be corroborated by the affidavit of some other person. 3. The other party shall be permitted to file a counter affidavit or affidavits stating any facts which may be proper for the consideration of the court, in the exercise of its discretion. 4. If the application for the removal of a cause be not made before the trial court, the party praying for the removal must pay the costs of that term, if the cause shall be removed."

Clark v. Corporation of Washington.

and informed him that if he persisted in his refusal he must be committed.

He then submitted to answer.

NOTE. CRANCH, C. J., did not concur in the opinion of the Court, in the case of the *United States v. Miller*, but considered himself now bound by that decision.

CHASTEIN CLARK v. CORPORATION OF WASHINGTON.

The Corporation of Washington, under the power given by their charter to authorize the drawing of lotteries, sold to one Gillespie, for \$10,000, a right to draw a certain lottery. *Held*, that a person who bought a ticket of Gillespie, could not recover from the Corporation of Washington, the prize drawn against that ticket.

ASSUMPSIT for \$100,000, the amount of a prize drawn against the ticket, No. 2929, in class No. 5 of the National Lottery.

The case was elaborately argued on the 7th, 8th, 9th, and 10th of December, 1824, by *Mr. Swann* and *Mr. Wirt*, for the plaintiff, and *Mr. Jones*, for the defendants; and on the 11th,

CRANCH, C. J., delivered the opinion of the Court (THRUSTON, J., absent,) as follows:

The declaration, in this case, contains four counts; one of which is for money had and received; the other three are special counts, setting forth the special circumstances, and averring a resulting liability on the part of the defendants to pay the amount of the prize.

The counsel for the defendant, after stating the evidence and testimony prayed the opinion and instruction of the Court to the jury, that if they "find the said evidence so offered on the part of the defendants to be genuine and true as above stated, and that the lottery ticket in the declaration mentioned and offered in evidence as aforesaid, was sold to the plaintiff by the said Gillespie, as the purchaser of the said lottery and for his own account, and risk, the evidence so offered on the part of the plaintiff, is not admissible, competent, and sufficient to charge the defendants in this action."

This prayer involves two questions.

1st. Is the plaintiff's evidence admissible notwithstanding the defendants' evidence?

2d. Is it sufficient to support the action notwithstanding the defendants' evidence, and notwithstanding the fact that the ticket was sold to the plaintiff by the said Gillespie as the purchaser of the lottery and for his own account and risk?

1. Upon the first question we can see no valid objection to the admissibility of the plaintiff's evidence. It consists of Acts of Congress; by-laws and resolutions of the corporate government of the city of Washington; the acts of the managers appointed under those by-laws; the scheme of the lottery; the advertisement of that scheme; the ticket which drew the prize in question; sundry depositions proving the purchase and lawful possession of the ticket by the plaintiff; the manager's official list of prizes, showing that that ticket drew the prize of \$100,000; and the letters of the plaintiff and his agent demanding payment of the prize from Gillespie, and from the mayor of the city, and their refusal to pay it; and the testimony of Mr. Webb, who was admitted to be a competent witness.

There seems to be nothing, in the nature of this evidence, to render it inadmissible; and if the declaration sets forth a good cause of action, this evidence tends to support it, and therefore seems to be admissible.

If the plaintiff's evidence, by itself, is admissible, we do not see how it can be rendered inadmissible by any evidence which the defendants can offer. The defendants' evidence may counteract the plaintiff's, but cannot render it inadmissible.

2. The second question is, whether, if the jury should find that the ticket was sold to the plaintiff, by Gillespie as the purchaser of the lottery, and for his own account and risk, the plaintiff's evidence is sufficient to support his action, notwithstanding the defendants' evidence.

The principal question, upon this branch of the prayer, as we understand it, is, whether the plaintiff can recover in this action, if the jury should be satisfied that Gillespie sold the tickets in his character of purchaser of the lottery with all its benefits and responsibilities, and the sales were for his own benefit and he was to receive the proceeds thereof to his own use, and not as agent of, or for the use of, the corporation, although the jury should be also satisfied, by the evidence, that the plaintiff, at the time of purchasing the ticket, did not know that Gillespie was selling it in the character of purchaser of the lottery as aforesaid, but, in fact, believed he was selling it in the character of agent for the managers, and was led to that belief by the declarations and acts of the managers themselves as well as of Gillespie.

This leads to the question, upon what grounds can the defendants be made liable in this action?

Their liability must be the consequence of an undertaking, either express or implied. If the undertaking be express, it must be by some corporate act, or by the intervention of some agent authorized to bind them to such an undertaking. No corporate

act is shown by which they have expressly undertaken to pay this prize ; nor is there evidence of any authority given by the corporation, to any agent, so to bind it. If there be an implied undertaking on the part of the corporation to pay the prize, it must result from some equitable principle of the common law. But what equitable principle is there that will oblige a party to pay money without a valuable consideration ? The corporation have received no valuable consideration for such an undertaking. It is true that they received \$100,000 from Gillespie ; but that was for the license to draw the lottery ; which license they were empowered by the Act of Congress, to grant. The receipt of that sum of money was no consideration as between the defendants and the plaintiff, upon which the law will raise an assumpsit to the extent of the plaintiff's claim. An implied assumpsit can only be coextensive with the consideration. If the defendants had received the money arising from the sales of the tickets, they would have received the fund out of which the prizes were to be paid, and would therefore have received money to the plaintiff's use, and the law would raise an implied assumpsit, on the part of the defendants to pay it.

Whether the defendants did, in law, receive the proceeds of the sales of the tickets, may depend upon the question whether Gillespie acted as the agent of the corporation, and received them to its use, and for its benefit ; or whether he received them to his own use as the purchaser of the whole lottery. This question of fact is, by the instruction prayed, left open for the consideration of the jury.

Mr. Gillespie may have been the agent of the managers to conduct the drawing, yet if he was not the agent of the corporation in the receipt of the proceeds of the sales of the tickets, but received them to his own use, as the purchaser of the whole lottery, the corporation cannot be considered, in law, as having received them.

We do not think it necessary to say more upon the construction of the ticket, than that it does not import an express undertaking, by the corporation, to pay or to guarantee the payment of the prizes.

Upon the whole, the Court is of opinion that the plaintiff's evidence is admissible, notwithstanding the defendants' evidence ; but that if the jury should find that the evidence so offered as aforesaid on the part of the defendants is genuine and true as stated, and that the lottery ticket, in the declaration mentioned and offered in evidence as aforesaid, was sold to the plaintiff, by the said Gillespie as the purchaser of the said lottery, and for his own account and risk, the evidence so offered on the part of the plaintiff is not sufficient to charge the defendants in this action.

The COURT refused to instruct the jury, as prayed by *Mr.*

Jones, that upon the whole evidence in the cause, the plaintiff was not entitled to recover; but upon the further prayer of *Mr. Jones*, instructed the jury, in substance, that if they should find, from the evidence that the lottery was sold to Gillespie, (as stated in the testimony of *Mr. Webb*,) and that he sold his ticket to the plaintiff, and received the purchase-money therefor, and for all the other tickets in the said lottery, to his own use and benefit, then the plaintiff cannot recover upon the said evidence.

Verdict for plaintiff, \$35,000 and interest from 17th March, 1823.

The defendant moved for a new trial, which the Court granted. And at April term, 1825, a case was agreed, upon which the Court rendered judgment for the defendant; which was reversed by the Supreme Court. 12 Wheaton, 40.

JOSEPH B. LADD v. SARAH LADD *et al.*

A bequest, of one hundred and fourteen shares of stock in the Bank of Potomac; sixty shares of Washington and Alexandria Turnpike stock; thirty-five shares of Washington Bridge stock; and \$10,000 in such United States six per cent. stock, bank or other stocks, at the current value, not under par, or money, as may be on hand, not otherwise appropriated, with power in the executors to change the investment of the funds, under the direction of the Orphans' Court, is not a specific legacy, but is liable for contribution if the assets are not sufficient to pay all the pecuniary legacies.

If the widow renounces the provision made for her in the will, the remainder-man takes an immediate estate in the property devised, subject to the widow's dower.

BILL in equity by Joseph B. Ladd, against the widow legatees, and devisees, of John G. Ladd, deceased.

It states that the testator devised to his wife, during her life, the use of his dwelling-house and lots on Prince and Water Streets; but after her decease he gives it in fee to his son, the complainant; also the use, interest, profits, and dividends of four hundred and thirty shares of stock in the Columbian Insurance Company of Alexandria, twenty shares of the Fire Insurance Company of Alexandria, seven and three fourth shares in the Little River Turnpike Company, thirty-eight shares in the Bank of the United States, together with \$10,000 in United States six per cent. bank or other stocks, at the current value, not under par, or money as may be on hand, not otherwise appropriated; with power to his executors to remove the funds to other institutions or investments, under the direction of the Orphans' Court. He then gives to his wife all his household and kitchen furniture, plate, bedding, clothing, provisions, &c., of every kind, to be possessed and enjoyed by her and her heirs forever.

To his daughter Sarah E. Ladd he gives one hundred and fourteen shares in the Bank of Potomac; sixty shares of the Washington and Alexandria Turnpike stock; thirty-five shares of Washington Bridge stock; together with \$10,000 in such United States six per cent. stock, bank, or other stock, at the current value, not under par, or money, as may be on hand, not otherwise appropriated; to her and her heirs forever; with power to the executors to change the investment of the funds, under the direction of the Orphans' Court; and he adds these words: "And should I determine hereafter to sell the Potomac stock herein mentioned, it shall not impair this devise, but, in such case, my daughter shall receive, in lieu thereof, \$11,400 in other stocks, or money."

To his son Joseph B. Ladd, the complainant, he gives certain real estates therein particularly described in fee-simple, together with all other real estate of the testator wherever situated; and also \$10,000 in such United States six per cent. stock, bank, or other stocks, at the current value, not under par, or money, as may be on hand, not otherwise appropriated.

He then gives sundry pecuniary legacies to a number of his relatives, and the residue of his estate to his children Joseph B. Ladd and Sarah E. Ladd, and his nephews J. H. Ladd, W. G. Ladd, and W. L. Haskins.

The will was dated 18th October, 1818.

The defendants having answered, the cause was set for hearing on the bill and answers; and the questions raised for the consideration of the Court were,

1. Whether the legacies in stocks were to be considered as specific legacies, not liable to contribution in case of a deficiency of assets to pay all the legacies.

2. Whether Joseph B. Ladd, the complainant, upon his mother's renunciation of the provisions of the will, is not immediately entitled to the property devised to her for her life, with remainder to him in fee.

Mr. Taylor, for the pecuniary legatees, contended that the stock legacies were not specific, and were liable to abate; and cited *Pierce v. Snaplin*, 2 Maddock, 7; *Kirby v. Potter*, 4 Ves. 748; *Innes v. Johnson*, Id. 568; *Avelyn v. Ward*, 1 Vezey, 425; 11 Ves. 522, 607; *Simmons v. Vallance*, 4 Br. C. C. 345; *Purse v. Snaplin*, 1 Atk. 414; Amb. 310; *Webster v. Hale*, 8 Ves. 410, 413; *Sleech v. Thorington*, 2 Vezey, 562; *Wilson v. Brown-smith*, 9 Ves. 180.

Mr. Swann, for the complainant.

The COURT (*THRUSTON*, J. absent,) was of opinion that the stock legacies were not specific. And that, upon the widow's

United States v. May.

renouncing the provision made for her by the will, the estate, devised to her for life, with remainder to the complainant, in fee, vested immediately in him.

THE MECHANICS BANK OF ALEXANDRIA v. E. P. TAYLOR AND
WIFE AND D. MARLE.

It is no fraud in a husband toward his creditors, to purchase real estate with the money which belonged to the wife before the marriage, and to take the deed directly to the wife, pursuant to a verbal agreement to that effect made with her before the marriage.

THE bill states that the complainants levied an execution issued on a judgment in their favor against E. P. Taylor, upon a house and lot which were purchased by him with his own funds and fraudulently conveyed to his wife; that the complainants purchased it at the marshal's sale, under the *feri facias*; that E. P. Taylor refuses to give them possession; and prays that the deed to the defendant's wife, and the deed from the defendant E. P. Taylor to the defendant David Marle may be set aside; and that the defendants may deliver possession of the premises to the complainants, and account for the rents and profits. The defendant Marle, in his answer, stated that he held a lien on the property for a debt of \$205 under a deed purporting to be from E. P. Taylor and his wife, but executed only by E. P. Taylor.

The separate answers of E. P. Taylor and wife, aver that the wife, having been a widow, and in trade before her intermarriage with E. P. T. had acquired considerable property, and had, at the time of the marriage, about \$3000 in bank; and that it was agreed between them, before the marriage, that it should be laid out in building a house upon a lot belonging to the wife; but that the lot being supposed to be too small, the intention to build was abandoned, and in lieu thereof the house and lot in question were purchased by E. P. T. with the wife's money, and conveyed directly by the vendor to the wife; denying all fraud, &c. The cause being, by consent, set for hearing on bill and answer,

The COURT (THRUSTON, J., absent,) decided that the claim of the wife was fair and upon a valuable consideration, and dismissed the bill.

UNITED STATES v. J. C. MAY AND M. SNYDER.

The United States are entitled to judgment at the return term upon revenue-bonds although, by the general rule and practice of the Court, the day after the last day of

United States v. Howland.

the term is the appearance-day to all writs returnable to that term, and the Court will, upon motion, rule the marshal to return the writ on some day during the term.

DEBT upon a revenue bond. The writ was returnable to this term.

Mr. Mason, for the defendants, contended that the United States could not have judgment at this term, because the defendant, according to the rules and practice of this Court, is not bound to appear, nor the marshal to return the writ until the first day after the end of the Court. 3 Tucker's Bl. 274, 275. The marshal continues to serve process returnable to the Court until the last day of the term.

Mr. Swann, District Attorney, *contrà*, insisted that the act of Congress of March 2d, 1799, § 65, [1 Stat. at Large, 676,] was imperative upon the Court, and left them no discretion. The writ is, on its face, returnable on the first day of the term; and the Court may call upon the marshal to return it on any day. And such has been the practice of this Court ever since its first establishment.

The Act of Congress is peremptory. The words are, "And where suit shall be instituted, on any bond, for the recovery of duties due to the United States, it shall be the duty of the Court where the same may be pending to grant judgment at the return term upon motion;" unless the defendant shall make oath that an error has been committed in the liquidation of the duties; "whereupon if the Court shall be satisfied that a continuance until the next succeeding term is necessary for the attainment of justice, and not otherwise, a continuance may be granted until the next succeeding term, and no longer."

The COURT (THRUSTON, J., absent,) said that this is the return term of the writ; and that the Act of Congress was peremptory.

The marshal was then called upon, at the motion of the District Attorney, to return the writ; which being done the defendants were called, and not appearing, judgment was entered up against the defendants.

 UNITED STATES v. THOMAS H. HOWLAND.

The United States may maintain *indebitatus assumpsit*, for duties not bonded. The collector's books in the handwriting of a deceased clerk, are evidence for the United States.

INDEBITATUS ASSUMPSIT, for duties not bonded.

Mr. Fendall, for the defendant, contended that *indebitatus assumpsit* would not lie for duties; and that the collector's books, in the handwriting of a deceased clerk, were not evidence.

But the COURT (THRUSTON, J., absent,) overruled both objections.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1824, AT WASHINGTON.

MEM. There was no term in October, the times of holding the Courts in this county having been changed to the first Monday in May and the third Monday in December, by the Act of Congress of the 13th of May, 1824, [4 Stat. at Large, 23,] Pamphlet Edition of Laws of United States for 1823, 1824, p. 42.

JANUARY 6, 1825.

FRENCH v. VENABLE, Executor of Bates.

The Court will not reinstate an action of replevin which has been discontinued, at a preceding term, for want of the appearance of the defendant, unless the omission to enter the appearance was by neglect of the clerk.
An appearance cannot be entered upon the docket, out of Court.

Mr. Hall, for the defendant, moved to reinstate this action of replevin, it having been discontinued at the last term by the non-appearance of the defendant.

The defendant's affidavit stated that *Mr. Caldwell*, ever since the death of *Mr. Bates*, had acted as the counsel of his executors. That the writ, in this cause, was returnable to the last term. That *Mr. Caldwell* was specially employed to defend it, and that the defendant was, until otherwise informed by *Mr. Wallach*, under a firm impression that *Mr. Caldwell* had entered his appearance for him. That just before the Court, upon hearing that his impression was erroneous, he desired *Mr. Hall* to enter his appearance, and was assured that he had done so. *Mr. Hall* made affidavit, that after the adjournment of the Court, in June, and before the expiration of the term, he called at the clerk's office, and, upon finding that no appearance had been entered for the defendant, "he ordered his appearance," "and supposed, until the beginning of this term, that it had been done."

The COURT (*Thruston, J.*, absent,) refused to reinstate the cause, saying, that an appearance could not be entered in the office; and the clerk was not bound, upon such a verbal order,

The Bank of Columbia v. Lawrence.

to make the entry in Court, at the adjourned session of the Court, although it was, in law, the same term. The Court has uniformly refused to reinstate such cases unless the omission to enter the appearance was by neglect of the clerk, and referred to the case of *Williamson v. Bryan*, at April term, 1823, [*ante*, 407,] and several other cases in this Court.

Mr. Key, for the plaintiff.

Mr. Hall, for the defendant.

THE BANK OF COLUMBIA v. LAWRENCE.

If the indorser of a note dated at Georgetown, District of Columbia, and held by a bank in that town, resides in the country two or three miles from the bank, but has a house or place of business within half a mile of the bank, where it was generally known, and especially known, to the runner of the bank, that he kept his account-books and received his ordinary bank notices, newspapers, and foreign letters, &c., a notice left for him at the post-office in Georgetown, and directed to him, at Georgetown, although that was his nearest post-office, and the one from which he usually received his letters which came by the mail, is not a sufficient notice to charge him as indorser, unless conformable to a well-established usage of the bank, known to the defendant at the time of his indorsement.

If, at the time of the indorsement of the note, which was made negotiable at the bank, it was the general usage of the banks and notaries in the District of Columbia to give notice to the indorsers on the day after the last day of grace, and such usage was known to the defendant, at the time of his indorsement, he is bound by such usage, and the notice so given is in due time.

ASSUMPSIT against the indorser of Joseph Milligan's promissory note for \$5000, at sixty days, negotiable in the Bank of Columbia, payable on the 13th-16th of April, 1819, and dated at Georgetown.

By the bill of exceptions in this case, it appears that evidence was offered, that the defendant, who was a morocco leather-dresser, and owned a house in the city of Washington, where he had his shop, removed, in the year 1818, into the country, in the county of Alexandria, where he lived, at the time of indorsing the note, and when it became payable, and that the Georgetown post-office was the post-office nearest to his residence, being two or three miles distant, and the one at which he usually received his letters which came by the mail. That the notice of non-payment was put into the Georgetown post-office, addressed to the defendant, "Georgetown," and that such was the generally known usage of the banks when indorsers resided out of the town; and that such usage was known to the defendant. That the defendant continued to own the house in Washington, which was only a quarter of a mile from Georgetown, where the plaintiff's banking-house was situated, and permitted his sister, Mrs. Harbaugh,

to occupy it without rent, and came regularly every week, two or three days in each week, to the said house, where he kept his book of accounts, and received his ordinary bank notices, his newspapers, and foreign letters, and where he was employed in winding up his former business and settling his accounts; and that his so coming to town, and so employing himself, at such times, at the said house, was generally known to persons having business with the defendant, and to the runner of the bank of Columbia.

Whereupon the plaintiffs prayed the Court to instruct the jury, that it was not incumbent on the plaintiffs to have left the notice of non-payment at the house occupied by Mrs. Harbaugh, but that it was sufficient to leave it at the post-office in Georgetown;

Which instruction, the COURT, being divided, (CRANCH, C. J., absent,) did not give.

And thereupon, the defendant prayed, &c., that the notice so given was not sufficient to charge the defendant; which instruction the COURT, (being divided,) did not give.

The case was, afterwards, in the same term, brought before a full court, when the following authorities were cited or consulted. *Bank of the United States v. Norwood*, 1 Har. & John. 422; *Lenox v. Roberts*, 2 Wheat. 377; *Bussard v. Levering*, 6 Ib. 102; *Lindenberger v. Bell*, Id. 104; *Magruder v. Bank of Washington*, 9 Wheat. 600. The demand need not be personal; it is sufficient if made at his place of abode, or generally, "at the place where he ought to be found." *Ireland v. Kip*, 10 Johns. 490; S. C. 11 Ib. 231; Chitty, 288; *Freeman v. Boynton*, 7 Mass. Rep. 483.

JANUARY 12, 1825. CRANCH, C. J., delivered the opinion of the COURT, (THRUSTON, J., dissenting.)

The first question is, would the notice, left at the post-office in Georgetown, if it had been left in due time, and if the defendant had not had a place of business or counting-house in Washington, have been sufficient?

Upon this point, we are referred to the case of the *Bank of the United States v. Norwood*, in 1 Har. & Johns. 422, a case which I have not seen lately, but which I believe decided that notice, (to an indorser living in the vicinity of Baltimore, and to whom the post-office at Baltimore was the nearest post-office,) put into the post-office at Baltimore, was good, the indorser having no known place of business or counting-house in Baltimore, or elsewhere, near any other post-office; it having been proved to be the usage of merchants in Baltimore, to give notice in that manner, in like cases; and the knowledge of such usage having been brought home to the indorser, at the time of his indorsement.

In general, if the holder and the indorser live in the same town, (and, by parity of reason, I should suppose, within the same post-office district,) notice left at the post-office is not sufficient. The general rule is, that the notice must be personal, or left at the defendant's usual place of abode, or place of transacting his mercantile business, or "the place where he ought to be found." *Magruder v. Bank of Washington*, 9 Wheat. 600. In order to justify the leaving of notice at any other place than the usual place of abode, it must be a place which the defendant has agreed to substitute for his place of abode, *pro hac vice*, or for receiving notices; and his agreement may be inferred from circumstances, such as its being the place where he usually transacts his mercantile business, receives and pays money, keeps his accounts, &c. The post-office is not such a place. For the convenience of trade, his agreement has been presumed, to receive, at the post-office, all communications which come by mail, from a distance; but the same reason does not exist, as to communications from persons residing in the same place or neighborhood; and therefore his assent to receive such communications at the post-office cannot be inferred; and certainly no such inference can be drawn, if the defendant have another known and regular place of transacting such business elsewhere. The strictness with which notice is required by the mercantile world, is evidence of the importance which they attach to it; and if actual notice be important, it is dangerous to multiply constructive or implied notices. But it is important to the indorser to have notice as soon as possible; he is therefore presumed to assent that such notice, if coming from a distance, shall be given by mail, because that is, in general, the most expeditious and convenient mode of giving it; but with respect to notices from his own immediate neighborhood, where no mail runs, information left at the post-office, is not the most expeditious nor the most certain, nor always the most convenient mode of giving notice. In many post-offices the mail is received only once or twice a week, and it is only on mail days that it is expected that anybody will call for letters. A notice might remain uncalled for, in the office, several days, whereas, it might, perhaps, be given by a messenger in an hour.

Upon general reasoning, therefore, I should conclude that when the parties reside in the same place, (meaning thereby a place where the same post-office is the post-office nearest to the residence of both parties, and between whose respective places of residence there is no communication by mail,) it is not sufficient to leave a notice at the post-office. Such, however, is stated to be the usage of the plaintiffs' bank, and the other banks in this district, and the defendant having been a dealer in the plaintiffs'

bank, may be presumed, it is supposed, to have had a knowledge of such usage at the time of his indorsement of the note, and to have agreed to be bound thereby.

But it is not clear that the usage, given in evidence, applies to a case where the indorser has a place of business known to one at least of the officers of the plaintiffs' bank, and generally known to persons having business with the indorser and in the immediate vicinity of the holder of the note. If it does not apply to such a case, then the usage that he assented to, does not embrace his case. It is only the defendant's consent to the usage that can bind him; and it is not material that one of the plaintiffs' officers did not know the fact which would exclude this case from the scope of the usage relied upon. If banks will rely on usages contrary to the general law of the land, they must do it at the risk of clearly establishing such usages, and bringing their cases clearly within them. It would be with extreme reluctance that the Court would decide against a claim of such importance upon so nice a point of law. But established principles must be maintained; and we must not, because the debt is large, sanction a looseness of practice that may unsettle the system of mercantile law.

Taking the general rule to be, that, when the parties reside in the same place, (understanding thereby the same post-office district, if I may use the expression, where the regular communication from one of the parties to the other cannot be by mail,) the notice must be personal, or left at the dwelling-house, or place of business of the party to be charged by the notice. *Ireland v. Kip*, 10 Johns. 490; *S. C.* 11 Johns. 231; *Freeman v. Boynton*, 7 Mass. Rep. 483. The right of the plaintiffs to give notice through the post-office at Georgetown, must depend upon the agreement, express or implied, of the defendant to receive notice in that way; and

The Court is of opinion, that if the jury should be satisfied by the evidence, that the usage of the Bank of Columbia, and of the other banks above referred to, was, at the time of the defendant's indorsing the said note, and for a long time before, such as is above stated in the statement of the evidence, notwithstanding the party to be charged, should have a place of business such as is stated in the said statement of the evidence, generally known as therein stated, and known to one of the plaintiff's officers as therein stated, then, from the fact that the defendant was a dealer in the Bank of Columbia in the manner stated in the said statement of evidence, the jury may infer that he had, at the time of indorsing the said note, a knowledge of such usage; and from such knowledge, may, in the absence of contradictory evidence,

Negro Rebecca v. Pumphrey.

infer that he assented to be bound by such usage, and to receive notice in that way; and if the jury should so infer, and should believe the other facts stated in the said statement of evidence to be true as therein stated, then the said notice so left at the Georgetown post-office as aforesaid, is sufficient to charge the defendant in this action as indorser of the note. But if, from the said evidence the jury should be satisfied that the said usage did not extend to indorsers having such place of business in the city of Washington, and known as aforesaid, and should believe the other facts to be as stated in the said statement of evidence, then the said notice so left at the Georgetown post-office as aforesaid, is not sufficient to charge the defendant in this action as indorser of the said note.

And the Court further instructed the jury, that if they believe from the evidence, (evidence having been offered to that effect,) that it was at the time of the indorsement aforesaid, the general usage of the said banks and notaries, in the District of Columbia, to give notice to indorsers of the non-payment of a note or bill, on the day after the last day of grace, and that the defendant was a dealer in the said banks as aforesaid, then it is competent for them to infer that the defendant knew of, and consented to such usage; and that if the jury should be satisfied by the said evidence that such notice was given to the defendant of the demand and non-payment of the said note on the day next after the said last day of grace, it was given in sufficient time to charge the defendant in this action."

To the refusal of the Court (upon the division) to give the instructions prayed respectively by the plaintiffs and the defendant, as well as to the first instruction given, both parties excepted.

The verdict and judgment were for the defendant.

Judgment reversed by the Supreme Court. 1 Peters, 578.

NEGRO REBECCA AND CHILDREN v. LLOYD PUMPHREY.

Upon a petition for freedom, suggesting an apprehension that the defendant will sell and remove the petitioners from the jurisdiction of the Court, supported by affidavit, a judge of this Court, in vacation, will order an injunction without security; and upon further affidavit that the defendant had attempted to carry the petitioners away after notice of the filing of their petition, the judge will order the marshal to take them into his custody for safe keeping until the defendant shall give the security required by law for their forthcoming to prosecute their petition; and if the defendant shall refuse to give such security, and if judgment shall be rendered against him, the marshal's fees for keeping them shall be taxed in the bill of costs against the defendant.

PETITION for freedom. The petition stated that the said Rebecca and her three children, William, Ann, and Margaret, are

Davidson v. Burr.

entitled to their freedom, but are held in slavery and bondage by a certain Lloyd Pumphrey; she therefore prays for a *subpoena* to him, commanding him to appear and answer the petition. "She also, having reason to apprehend a sale and removal immediately from the jurisdiction of your honorable Court, prays a writ of injunction, enjoining and forbidding the said Lloyd and his agents from removing her and her children as aforesaid; hoping such other relief as may be meet in the premises; thus ever prays. Thomas Turner, Solicitor for petitioners.

"District of Columbia, Alexandria county, ss. On this 24th of November, 1824, personally appears before me, justice of peace in and for the county aforesaid, Thomas Turner, and makes oath on the holy evangelists of Almighty God that he believes that Lloyd Pumphrey meditates the sale and removal from the district, of the within named petitioner and children, as stated in the petition. Sworn before me, Jacob Morgan. Let an injunction issue as prayed. B. Thruston. William Brent, Esq. clerk, &c., &c., 25th November, 1824."

Afterwards, upon an affidavit that the defendant had attempted to carry the petitioners away, after notice of their having filed their petition for freedom, the judge, upon the urgency of the case, directed the marshal to take them into custody. The defendant refused to give the security required by law for the forthcoming of the petitioners to prosecute their petition, and they were kept in prison until the trial; viz. from November 26, 1824, to January 8th, 1825, forty-four days, at an expense of thirty-four cents a day for each, and one dollar each for commitment and release; making \$63.84. Verdict for the petitioners.

The COURT, on the motion of *Mr. Turner*, ordered this expense to be taxed in the bill of costs against the defendant.

Mr. Turner, for the petitioners.

Mr. Marbury and *Mr. R. S. Coxe*, for the defendant.

NELSON DAVIDSON v. LEVI S. BURR.

An appeal does not lie to this Court from the judgment of a justice of the peace in a cause which has been tried by a jury before the justice.

Quare, whether a justice of the peace in the District of Columbia is a judge of a court of the United States within the meaning of the Constitution of the United States, in relation to the tenure of office.

THIS was an appeal from the judgment of a justice of the peace in a case, above the value of \$20, which had been tried

The Bank of Columbia v. Jones.

by a jury before the justice under the Act of the 1st of March, 1823, "to extend the jurisdiction of the justices," &c.

It was objected, that a justice of the peace trying causes by a jury, was a judge of an inferior court of the United States, and therefore ought to be appointed *quamdiu se bene gesserit*; and not having been so appointed, but holding his office only for five years, he was not a competent judge, and had no jurisdiction of the cause. It was also suggested that a cause once tried by a jury could not at common law be tried again by jury in another court; nor could the fact be afterwards tried again by the Court.

The COURT (MORSELL, J., *contra*,) was of opinion that the justice had jurisdiction; but that under the 7th amendment of the Constitution of the United States, which declares that "in suits at common law," "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law," there cannot be a trial by jury in this Court of a cause which has been tried by jury before a justice of the peace. This cause has been tried by jury before the justice, and by the rules of the common law it cannot be re-examined by a jury in any other court; nor by the judges without a jury.

And CRANCH, C. J., was of opinion that a writ of error, upon a bill of exceptions, will only lie to a court of record. The proceedings of Courts not of record, can, by the common law, only be brought up by *certiorari*, if brought up at all; and not by appeal.

Upon the question whether the justice had jurisdiction, CRANCH, C. J., was of opinion that if the justice was such a judge of an inferior court of the United States, as is intended by the third article of the Constitution of the United States, the same article fixed the tenure of his office, and it could not be altered by an Act of Congress. And that if he was not such a judge, then the argument from the Constitution did not apply to his case.



THE PRESIDENT, DIRECTORS, AND COMPANY, OF THE BANK OF COLUMBIA v. RICHARD JONES.

If the plaintiffs are misnamed, in the title of the cause, in the margin of a plea of limitations, the plea is bad on special demurrer.

The plea of limitations, in this cause, was entitled, in the margin of the paper, "The President and Directors of the Bank of Columbia v. Richard Jones."

The plaintiffs demurred, and assigned for cause, that the plain-

Brent's Executors v. The Bank of Washington.

tiffs, stated in the said plea, and whose declaration the said plea purports to answer, are stated to be "The President and Directors of the Bank of Columbia," whereas the plaintiffs in this suit, and whose declaration the said plea ought to have answered, are "The President, Directors, and Company of the Bank of Columbia;" so that the said plea does not reply to, and is no answer to the declaration of the plaintiffs in this cause.

Mr. Key and Mr. Dunlop, for the plaintiffs.

Mr. Marbury, for the defendant.

The COURT (CRANCH, C. J., *contrà*,) was of opinion that the names of the parties stated in the margin were to be considered as part of the plea, and made important by the special demurrer; and that the titling of the cause in the margin, would make a part of the record, and adjudged the plea to be bad.

This decision was, afterwards, at this term, overruled, in the case of *The Bank of Columbia v. Ott's Administrators*, (*post*, 529.)

ROBERT BRENT'S EXECUTORS v. THE BANK OF WASHINGTON.

Upon the death of a stockholder in the Bank of Washington, insolvent, and indebted to the United States, the bank has no right to set off the dividends accruing upon his stock, after his death, against notes upon which he was indorser.

The Bank of Washington has no specific lien upon the dividends of its stockholder, in consequence of its right to prevent a transfer of the stock, until his debt to the bank should be paid.

After the death of a customer of the bank, a notice, left with the person who was authorized by him, in his lifetime, to receive notices for him, does not bind his executors.

ASSUMPSIT, for dividends upon the testator's bank stock, accruing after his death, he having died insolvent, and largely indebted to the United States. He was also indebted to the bank, as indorser of discounted notes. The bank claimed a lien on his stock, under the 11th section of their charter, and a right to set off the dividends against this debt.

One of the notes offered as a set-off became due after his death. His will was proved about a month after the note became payable, but the executors did not obtain letters testamentary until nearly two years afterwards. No notice of non-payment by the maker was ever given to the executors, nor any inquiry made for them; but notice was given to J. H. Reily, with whom the testator had agreed, in his lifetime, that notices for him should be left.

The COURT (THRUSTON, J., *contrà*,) was of opinion that such notice was not sufficient.

The COURT also (THRUSTON, J., *doubting*,) decided that the bank had no specific lien upon the dividends accruing after the

 Peters's Executors v. Breckenridge.

death of the testator, he being insolvent, and indebted to the United States. The lien upon the stock is given by the charter; but it is only given by means of the power to refuse to permit a transfer to be made on the books of the bank until the debt due by the stockholder to the bank is paid. The charter gives no power to retain the dividends; and, upon the death of the testator, new rights accrued. The bank had no right to set off the dividends accruing after the death of the testator.

 UNITED STATES, for the use of A. & J. B. Holmead, v. A. T. F. BILL.

A constable's official bond is not vacated, or rendered void, by his temporary removal from office, but covers his official conduct after his reinstatement in office as well as before the suspension of his functions.

THE defendant had been appointed by the Court, a constable for the county of Washington, and gave bond in 1818.

The suit was brought to recover the amount which he had received upon two writs of *fieri facias*, in favor of A. and J. B. Holmead.

THE COURT, on the 20th of January, 1819, upon the request of the grand jury, ordered that "he be removed" from the office of constable. On the 27th of the same month, the COURT, for reasons stated on the minutes, ordered "that he be reinstated in his office of constable, and that the former order, dismissing him from that office, be rescinded." The two writs of *fieri facias*, for the amount of which he was now charged, and which he had returned "satisfied," were dated in April, 1819, and returnable on the first Monday of May following.

The defendant demurred to the evidence, and contended that his bond was vacated by his removal from office, and that it did not cover his official acts done after the order for his removal was rescinded.

But the COURT was of opinion, that the order for his removal having been rescinded at the same term, it is as if it had never been made, and did not release his sureties from responsibility for his subsequent official acts.

 ROBERT PETERS'S EXECUTORS v. JOHN BRECKENRIDGE, Executor of James White, senior.

The possession of property by the defendant, under a disposition of it by deed in the lifetime of the deceased, is not such a possession as will, in law, constitute the possessor executor *de son tort*.

If the issue of "never executor" be found against the defendant, the judgment will be *de bonis testatoris si, &c.; et si non, de bonis propriis*.

DEBT upon the bond of James White, senior, charging the defendant as executor.

The defendant pleaded *ne unques* executor.

Upon the issues joined on these pleas, the plaintiffs, in order to charge the defendant as executor *de son tort*, proved that James White died in possession of considerable personal property, which came to the hands of the defendant.

The defendant, to show that the property was given to his wife, in the lifetime of White, offered, in evidence, with the assent of the plaintiffs, a certain paper, under seal, executed by White and his two grandchildren, one of whom was the defendant's wife, which stated that it was the will and desire of the said White to give a certain tract of land and fifteen negroes, to be equally divided between his said two grandchildren; and he thereby appointed certain persons to make the division; and the two grandchildren were to throw into hotch-pot two tracts of land, and then the whole three tracts were to be equally divided between them. The two grandchildren bound themselves, in a penalty, to abide by the division to be made by the persons so to be appointed. The instrument is under the hands and seals of the said James White, senior, and the two grandchildren, and of the defendant, who had married the granddaughter, and was dated in February, 1800. White died in March, 1801. The defendant and his wife resided with White until his death; and the slaves continued on the place, and were employed as usual, until his death; the division was not made until after his death.

Mr. Jones, for the defendant, prayed the Court to instruct the jury, in effect, that the possession of the property, by the defendant, under that deed and the circumstances stated, was not such a possession as, in law, makes the defendant executor *de son tort*.

Which instruction the COURT gave. (MORSELL, J., not sitting, having been formerly the counsel of the defendant, in the case.)

The jury, however, found a verdict for the plaintiffs, which, with the judgment thereon, was ordered to be entered in the following manner, namely:—

The jurors, &c., on their oath, say, as to the issue joined upon the plea of *ne unques* executor, that the within named John Breckenridge, as executor of the last will and testament of the said James White, senior, did administer divers goods and chattels, which were of the said James, at the time of his death, in manner and form as the said (plaintiffs) have, within, in replying, alleged.

And the said jurors, on their oath aforesaid, do further say, as to the issue joined upon the plea of payment, that the said James did not pay, &c., as in his said plea the said defendant hath alleged. And they find that the sum of \$897.07, current money, with interest thereon, from the 1st day of January, 1803, till paid, is justly due to the said (plaintiffs) on the writing obligatory aforesaid.

Therefore it is considered by the Court here that the said (plaintiffs) recover against the said John Breckenridge, as such executor as aforesaid, as well the sum of £1218 10s. sterling, equal to \$5,415.56 current money their debt aforesaid, as the sum of \$10,000 damages, the said debt and damages to be released on the payment of \$897.07, with interest thereon from the first day of January, 1803, till paid, and the sum of by the Court here, unto the said (plaintiffs,) on their assent adjudged for their costs and charges by them, about their suit, in this behalf, expended; to be levied of the goods and chattels which were of the said James White at the time of his death in the hands of the said John Breckenridge to be administered, if he hath so much thereof in his hands to be administered, and if he hath not so much thereof in his hands to be administered, then to be levied of the proper goods and chattels of the said John Breckenridge; and that the said (plaintiffs) have thereof their execution, &c.; and the said John Breckenridge, in mercy, &c.

Mr. Key and Mr. Dunlop, for the plaintiffs.

Mr. Jones, for the defendant.

UNITED STATES v. JAMES GREEN.

A written request to lend money, may be the subject of forgery at common law.

INDICTMENT for forging "a certain paper-writing purporting to be a request or order upon one R. Woodward for the loan of money, and to be signed by one John Duley, with the name of the said John Duley thereunto affixed, the tenor of which paper-writing is as follows, to wit: 'Georgetown, October 19th, 1824. Mr. R. Woodard, Sir, would you Be so kind as To lend me ten or 15 Dollars And Eye will call And settle with you on the 20th. John Duley.' With intent to defraud the said R. Woodward, otherwise called Roswell Woodward, against the form of the statute in that case made and provided, and against the peace and government of the United States."

The defendant pleaded guilty. But the Court, having some doubt whether it was forgery either at common law or under the

Maryland Act of 1799, c. 75, § 2, took time to consider. That act has the words, "any warrant or order for payment of money."

The COURT (THRUSTON, J., absent,) decided that this was not a warrant or order for the payment of money, and therefore not within the statute of Maryland; but that the indictment was good as an indictment for forgery at common law, upon the following authorities; *The King v. Ward*, 2 Ld. Raym. 1461, and the cases there cited, namely, *Rex v. Stocker*, 5 Mod. 137; S. C. 1 Salk. 342, 371, which was an indictment at common law for forging a bill of lading, and which was adjudged bad on demurrer because the charge was in the alternative, namely, that he forged or caused to be forged; but no exception was taken to it because the offence was not forgery at common law. *Rex v. Ferrers*, 1 Sid. 278. Forging an acquittance for £7. *Farr's case*, T. Raym. 81. A warrant of attorney. *Dudley's case*, 2 Sid. 71. The entry of a marriage in the register of marriages. *Savage's case*, Styles, 12. Letters of credence for collecting money. *Rex v. Deakins*, 1 Sid. 142, for counterfeiting a protection in the name of Sir Anthony Ashley Cooper, as a member of Parliament, when he was not. *Regina v. Yarrington*, 1 Salk. 406. For forging a letter. *Rex v. Ward*, 2 Ld. Raym. 1466. For forging an indorsement on the back of a certificate.

JOHN MUNCASTER v. J. MASON AND W. JONES.

If the plaintiff has countermanded his execution at the request of the defendant to give him time, or if he has been delayed by injunction obtained by the defendant, he may take out a new execution after the expiration of the year and day.

RULE to show cause why four executions, in favor of Muncaster against Mason and Jones, should not be quashed, because issued more than a year and day after judgment.

Mr. E. J. Lee, for the plaintiff, showed for cause, as to two of the executions, that the plaintiff had been delayed by injunction obtained by the defendant, Mason, and finally dissolved under a mandate from the Supreme Court of the United States; and as to the two other executions, that the plaintiff had issued his executions in due time, but had countermanded them at the particular solicitation of the defendant. See *Mitchell v. Cue and wife*, 2 Burr. 660; *Phillipps v. Lowndes*, in this Court, December term, 1805, (1 Cranch, C. C. 283); *Craig v. Johnson*, Hardin's Rep. 521.

Mr. Key, *contra*, cited *Winter v. Lightbound*, Str. 301; *Booth*

Owen v. Glover.

v. *Booth*, 1 Salk. 322 ; S. C. 6 Mod. 288 ; *Salmon v. Yeates*, 1 Har. & Johns. 488.

The COURT (MORSELL, J., *contrà*,) upon the authority of the cases cited by Mr. Lee, refused to quash the executions, upon the ground that the first executions had been countermanded at the request of the defendant, and by way of indulgence. (See also the case of *Noland v. Cromwell's Lessee*, 6 Mun. 185, 187.)

OWEN & LONGSTRETH v. GLOVER.

If a debtor be taken on a *ca. sa.* in the District of Columbia, and give a prison-bounds bond, upon which also judgment is rendered against him, he may be retaken on the original *ca. sa.* after the expiration of a year from the date of the bond, and committed to close custody in execution.

Mr. Jones, for the defendant, moved the Court to quash the *ca. sa.* upon which the defendant was committed in execution. The original judgment was rendered in June, 1818. On the 20th of May, 1820, the defendant having been taken upon the *ca. sa.* issued upon that judgment, gave a prison-bounds bond. On the 6th of July, 1820, he broke the bounds, and the plaintiffs brought suit on the bond against him and his surety, in which suit judgment was, at the last term, rendered against him, but the suit is still pending against his surety. The year from the date of the prison-bounds bond having expired, the marshal, in obedience to the Act of Congress of the 24th of June, 1812, [2 Stat. at Large, 755,] recommitted him to close jail, upon the original *ca. sa.*

Mr. J. Dunlop, for the plaintiff. The original arrest on the *ca. sa.* and the giving of the prison-bounds bond, are no satisfaction of the judgment. The plaintiff may retake his debtor, although he has recovered part of the debt in an action against the sheriff for an escape. They are concurrent remedies. Esp. N. P. 611 ; *Bloomfield's case*, 5 Co. 86. The plaintiff may have a *fi. fa.* against his debtor, and may proceed against the sheriff for an escape at the same time. *Jackson v. Martin*, 8 Johns. 366. So, in Maryland, the plaintiff may proceed upon the original judgment, or upon the *supersedeas*.

Mr. Jones, *contrà*. The plaintiff can, in no case, have more than one execution at the same time upon the same judgment. In Maryland the plaintiff cannot have execution at the same time against the original debtor on the original judgment and on the *supersedeas*. The case in 8 Johnson, depends upon the statute of New York, which gives a *fi. fa.* after escape upon a *ca. sa.* After a prison-bounds bond given upon a *ca. sa.* there is no remedy under the Act of Congress, but a suit upon the bond.

Maddox v. Stewart.

The COURT (THRUSTON, J., absent,) decided that the marshal had the right to take the debtor under the original *ca. sa.* and that he cannot now be permitted to have the benefit of the prison bounds, the year having expired.

W. R. MADDOX v. ARCHIBALD STEWART.

If a creditor gives a credit upon his account so as to bring it within the jurisdiction of a justice of the peace, and if the debtor does not object to the credit before the justice, his assent to the credit will be presumed.

No appeal lies from the judgment of a justice of the peace rendered upon the verdict of a jury.

APPEAL from the judgment of a justice of the peace, upon the verdict of a jury.

The COURT (MORSELL, J., *contrà*,) dismissed the appeal, upon the ground that a fact once tried by a jury cannot be reëxamined otherwise than according to the rules of the common law. (See the seventh amendment of the Constitution of the United States.) And that a second trial by jury in another court is not according to the rules of the common law.

Mr. J. Dunlop, for the appellant, contended that it appeared, by the account on which the judgment was rendered, that the appellee had given a credit "by gift, &c. &c." so as to leave a balance of \$50, and bring his claim within the jurisdiction of the justice; which he had no right to do.

Mr. Key, *contrà*. That was done before application was made to the justice for the warrant, and the appellant at the trial did not object to it, except that it was for too small a sum. *Mr. Key* cited the case of *Porter v. Rapine*, in this Court, at June term, 1812, (*ante*, 47,) in which it appeared that Rapine had released \$6.85 of his claim so as to give jurisdiction to the magistrate, who gave judgment for \$20; and this Court affirmed the judgment, as it did not appear that the appellant had objected to the credit before the justice.

CRANCH, C. J., mentioned the case of *Casenove v. Darrell & Groverman*, in Alexandria, [*ante*, 444,] in which the creditor had given a credit in order to bring his claim within the jurisdiction of the justice of the peace. The debtors objected to the credit before the justice; and this Court decided that the creditor could not, without the consent of the debtor, release a part of the debt for that purpose.

The COURT (THRUSTON, J., absent,) was of opinion that as the appellant, in the present case, did not object to the credit before the justice, his assent may now be presumed; and that therefore the justice had jurisdiction of the cause.

 Oneil v. Hogan.

CHARLES BURTON v. MARY P. VARNUM.

A creditor cannot, without the consent of the debtor, relinquish part of his claim so as to bring it within the jurisdiction of a justice of the peace.

APPEAL from a justice of the peace.

The balance of the account upon which the justice issued his warrant was \$68, which figures had been erased and altered to \$50; but the account still showed that the real balance was \$68. The defendant, before the justice, objected to his jurisdiction; but the plaintiff having afterwards given up the difference, (\$18,) the justice gave judgment for \$50, with interest from the date of the judgment till paid.

The COURT (*nem. con.*) decided, that the justice had not jurisdiction, and that the plaintiff could not give it in that way without the consent of the defendant to the credit.

 MARY ONEIL v. THADY HOGAN.

A woman, against whom a justice of the peace has issued a warrant for a small debt, and who is notified by the officer to appear before the justice at a certain time and place named in the warrant, is bound to appear and answer; and if she does not, the justice may proceed *ex parte* and render judgment against her by default.

APPEAL from the judgment of John Chalmers, Esq., a justice of the peace for the county of Washington, for \$20 and costs.

The warrant was issued by E. Reynolds, Esq., on the 23d of June, 1823, directed to J. W. Beck, constable, commanding him to take into his custody, the body of Mary Oneil, and her safe keep, so that he should have her before a justice of the peace in and for said county, on the 25th day of June, instant, to answer to Thady Hogan in a plea of debt. "Hereof fail not, and make your return as aforesaid," &c. The constable's return was, "C. P. for trial ten o'clock, A. M., 26th instant, June. J. W. Beck." The following was indorsed on the warrant: "Judgment for plaintiff, \$20 debt on interest, and fifty-eight cents costs. John Chalmers. 26 June, 1823."

Mr. Ashton, for the appellant, contended that the judgment below was irregular, and that the justice had not jurisdiction, because the process was *capias*, and appointed a certain day for the hearing; and by the Act of Congress of the 1st of March, 1823, [3 Stat. at Large, 743,] no female can be arrested for a debt. It appeared in evidence that she was not arrested, but was notified, by the officer, of the time and place when and where

Baker v. Mix.

she was to appear and answer, to wit, at the office of Messrs. Wharton & Chalmers, two justices of the peace, at ten o'clock, A. M. Mr. Justice Wharton, being consulted by her, advised her not to attend, saying that the justice had no right to issue a *capias* against her, and that she was not bound to appear. She did not; and when the *capias* was returned, Mr. Wharton refused to act in the case; but Mr. Justice Chalmers being satisfied that the defendant was notified, gave judgment by default.

The COURT (MORSELL, J., *contra*,) was of opinion, that the defendant was bound to appear upon such a notice, and that the justice might give judgment by default, and affirmed the judgment, but without costs. *Quere?*

W. BOYD'S ADMINISTRATOR v. H. M. WILSON'S ADMINISTRATOR.

The books of a bank, which do not show whether the checks drawn upon it were payable to bearer or to order, nor the names of the persons in whose favor they were drawn, are not evidence of money paid to any particular person.

THE books of the Bank of Washington were offered in evidence by the defendant, to show that a check for \$255 drawn by Wilson, was payable and paid to Boyd. J. H. Reiley, the book-keeper of the bank, stated that the bank-books did not show whether the check was payable to order or bearer, nor whether it was paid to the person whose name appears on the books as payee.

THE COURT (*nem. con.*) and in conformity to their decision in the case of *Burch, Dougherty's Administrator, v. Spaulding's Administrator*, at October term, 1813, (*ante*, 422,) decided that the books of the bank were not competent evidence of the payment of the amount of the check to Boyd.

JOHN W. BAKER v. ELIJAH MIX, Garnishee of John Bulkley, surviving partner of John Bulkley & Co.

When the issue is joined between the plaintiff and the garnishee, in behalf of himself and his principal, the depositions must be entitled as of a suit between the plaintiff and the garnishee, and not between the plaintiff and the principal defendant.

ATTACHMENT, under the Maryland Act of 1795, c. 56. The garnishee appeared and pleaded, 1st. That the said John Bulkley & Co. had fully performed the covenant on their part; upon the replication to which plea issue was joined. 2d. That he, the

Nicholls v. Fearson.

garnishee, had no effects of the principal debtor in his hands; upon the replication to which, issue was also joined.

At the trial of these issues, *Mr. Marbury*, for the defendant, offered in evidence a deposition, taken under the Act of Congress, in a suit in which John W. Baker was plaintiff, and John Bulkley was defendant.

Mr. Redin, for the plaintiff, objected to the reading of the deposition, because it was not taken in this suit, which is between Baker and Mix, and not between Baker and Bulkley. *Smith v. Coleman*, in this Court, at April term, 1821, in this county, (*ante*, 237,) and *Peyton v. Veitch & al.* at November term, 1816, in Alexandria, (*ante*, 123.)

Mr. Marbury, in reply. By the 4th section of the Act of 1795, c. 56, "the garnishee may plead, in behalf of the defendant, such plea or pleas as the said defendant might or could do if he had been taken by the sheriff under the writ of *capias ad respondendum* issued as aforesaid, and had accordingly appeared to the same." When the garnishee thus pleads in behalf of the principal, it becomes substantially a suit between the plaintiff and the principal, and may truly be entitled as such. The suit was originally brought against the principal, and was so entitled until the garnishee appeared; and if perjury were committed upon the trial, it might be averred in the indictment, and proved to have been in an action between the plaintiff and the principal.

Although the garnishee has pleaded for himself as well as for his principal, the issue upon the plea for the principal is, in effect, a suit between the plaintiff and the principal, and may be averred to be such. *Dale v. Baer*, 7 East, 333.

The COURT (THRUSTON, J., absent,) thought that Bulkley, not having appeared, could not be considered as a party in the cause, and rejected the deposition.

W. S. NICHOLLS v. JOSEPH FEARSON.

If the writ be against two defendants, and one only be taken, the cause is discontinued, unless an *alias capias* be issued against the defendant not taken, and continued by pluries, &c., until the trial term.

On the 21st of March, 1823, the plaintiff issued a *capias ad respondendum* against Samuel Fearson and Joseph Fearson, returnable on the 2d Monday of April, 1823, and which was returned "*Capi Joseph; Non Est Samuel.*" No *alias capias* was issued against Samuel. Joseph gave special bail, and pleaded the general issue; and now at the trial term,

Dixon v. Waters.

Mr. R. S. Coxe, for the defendant, contended that the cause was discontinued by not continuing process against Samuel, the joint defendant named in the first *capias*.

Mr. J. Dunlop and *Mr. Key*, *contrà*. The practice has not been uniform to issue a *pluries*. It has been generally done, as a matter of choice, but not of necessity. Perhaps an *alias* may be necessary; but if a *pluries* be not necessary, why should an *alias*?

The COURT (*nem. con.*) decided that process of *capias* by *alias*, *pluries*, &c., must be continued against the absent defendant, until the trial term; and that, for the want of it in this case, the cause has been discontinued, and should be struck off the docket.

CRANCH, C. J., and MORSELL, J., stated that they always understood the practice to be so in Maryland.

But *Mr. Key* having stated, that the precedents in Harris's Entries mention one *non est* only, and not being able to refer to the book now,

The COURT said they would hear a motion to reinstate the cause, if *Mr. Key* should think he could support the motion.

No such motion was made, and the plaintiff brought a new suit, in which both defendants were taken. See *McCandless v. McCord*, at March term, 1835, [*post.*]

DIXON v. WATERS, Bailiff of Van Ness.

If the defendant in replevin be the bailiff of the landlord, and is indemnified by him, he may be examined as a witness in the cause. *Quare.*

REPLEVIN; avowry for rent arrear.

Mr. Ashton, for the defendant, moved the Court to substitute *Mr. Van Ness* for the defendant *Waters*, the latter being only the bailiff of the former in a distress for rent.

The COURT refused, (*nem. con.*) but on the trial, being pressed by the case of *Wise v. Bowen*, decided at April term, 1821, [*ante*, 239,] the COURT (MORSELL, J., *contrà*,) permitted the defendant, *Waters*, to testify as a witness, not perceiving any material difference in principle between this case and that of *Wise v. Bowen*, on that point. In that case the defendant, *Bowen*, a constable, had taken the property in execution. The plaintiff claimed the property and replevied it. The officer, upon receiving indemnity from the plaintiff in the execution, was permitted by the Court to testify for himself, (CRANCH, C. J., doubting.)

McElroy v. English.

MORSELL, J., said that he had concurred in the opinion of the Court in the case of *Wise v. Bowen*, because the officer was obliged, after receiving the indemnity, to take the goods in execution, and was merely a formal party to the suit, which differs in that case from this, where the defendant is a voluntary bailiff, and not bound by official duty to make the distress.

CRANCH, C. J., said that he should probably have been of the same opinion with MORSELL, J., if he had known that he did not concur with THRUSTON, J., in the present case; as he had doubted of the propriety of the opinion in the case of *Wise v. Bowen*; and thought the point ought to be reconsidered.

Verdict for the plaintiff.

UNITED STATES v. WILLIAM RUTHERFORD.

If three persons be jointly indicted for a riot, and one only be put upon his trial, the other two having forfeited their recognizances, cannot be examined as witnesses for the defendant.

The offender who has committed an infamous offence, is restored to his competency as a witness, by a pardon.

THE defendant and two others were indicted for a riot, and also for a simple assault and battery, in separate counts of the same indictment.

Mr. Jones, for the defendant, offered to examine as witnesses, the two who had forfeited their recognizances.

The COURT (*nem. con.*) refused.

Mr. Jones then offered to examine as a witness for the defendant, one Golding, who had been convicted under the post-office law of 30 April, 1810, of embezzling letters and stealing bank-notes therefrom, but was pardoned by the President.

The COURT (*nem. con.*) permitted him to be sworn.

McELROY v. ENGLISH.

If Sunday be the last day of grace on a promissory note, demand on Saturday is not too soon, and notice on Monday is not too late.

ASSUMPSIT against the indorser of a promissory note. The parties all resided in Georgetown; Sunday was the last day of grace; payment was demanded on Saturday, and notice given to the defendant on the Monday following.

The COURT (THRUSTON, J., absent,) said that the demand was not too soon, and the notice was not too late.

NATHAN MOORE v. JAMES SHIELDS.

In order to support an action upon a replevin-bond, it is not necessary that the defendant in replevin who has recovered judgment against the plaintiff in replevin for damages and costs, should obtain a writ of *retorno habendo* returned "*eloigned*;" but the non-payment of the damages found by the jury, is a breach of the condition of the bond upon which an action may be maintained.

DEBT on a replevin-bond. The breach alleged, was the non-payment of the damages and costs found by the verdict of the jury in the trial of the action of replevin, for the defendant in replevin against the plaintiff in replevin.

The defendant, who was a surety in the replevin-bond, pleaded in substance, that the plaintiff in replevin was always, after the judgment of the Court in that action, ready to return the replevied property, and still is ready to return it. To this plea there was a general demurrer and joinder.

The condition of the bond was to prosecute the writ of replevin with effect; to return the goods replevied, if a return thereof should be adjudged by the Court, and to pay all such costs, charges, and damages as may be adjudged by the Court to be sustained by occasion of replevying the said goods; and in all things well and truly to observe and perform the judgment of the said Court upon the premises.

Mr. Ashton, for the defendant, contended that no action could be maintained upon the bond until a writ of *retorno habendo* should have been issued and returned "*eloigned*." But in the action of replevin the defendant in replevin did not obtain a judgment for a return.

The Court (*nem. con.*) adjudged the plea to be bad, and rendered judgment upon the demurrer, for the plaintiff, for the penalty of the bond and damages, to be released on the payment of the damages found for the defendant in replevin in that action and the costs of the replevin, and the costs of the present action upon the bond.

 THE BANK OF COLUMBIA v. OTT'S ADMINISTRATORS.

The title of the cause written in the margin of a plea is no part of the plea, but is only an intimation to the clerk in what cause he is to enter the plea; and a mistake in the name of one of the parties in the cause, made in the marginal title, is not fatal to the plea, even upon special demurrer.

The defendants pleaded the statute of limitations. The name

 Scott v. Law's Administrator.

of the plaintiffs, in the margin, or at the head of the plea, was "The President and Directors of the Bank of Columbia;" whereas the corporate name of the plaintiffs was "The President, Directors, and Company of the Bank of Columbia." The plaintiffs demurred specially to the plea, and assigned the same cause of demurrer as in the case of the same plaintiffs against Richard Jones, at the present term, (*ante*, 516.)

Mr. Marbury, for the defendant, notwithstanding the decision of the Court in that case, was permitted to argue the point again. He contended that the names of the parties in the margin do not constitute any part of the plea. 1 Chitty, 528; *Dale v. Baer*, 7 East, 333; *Dyer v. Stevens*, 6 Mass. Rep. 389.

Messrs. Key & Dunlop, contra, cited 1 Chitty, 527, 528, 645, 656; *Roberts v. Moon*, 5 T. R. 487.

The COURT (*THRUSTON, J. contra*,) decided that the plea was good, considering the titling as no part of the plea, but an indication to the clerk in what cause he is to enter the plea; overruling the case of *The Bank of Columbia v. Jones*, at this term, [*ante*, 516.]

 BANK OF THE METROPOLIS v. R. BRENT'S EXECUTORS.

If a note be payable at a certain bank, and payment be there demanded, it is not necessary to make a personal demand upon the maker, in order to charge the indorser.

ASSUMPSIT, against the executors of the indorser of George A. Carroll's note for \$1100. After verdict for the plaintiffs, as stated in 1 Peters, 89, the defendants moved in arrest of judgment because it did not appear by the declaration that demand had been made upon the maker.

The declaration stated that the note was negotiable at the Bank of the Metropolis, and that it was demanded at that bank "where it was payable."

The COURT (*THRUSTON, J., absent*,) overruled the motion, and judgment was rendered for the plaintiffs, which was affirmed by the Supreme Court of the United States. 1 Peters, 89.

 ALEXANDER SCOTT v. JOHN LAW'S ADMINISTRATOR.

In Maryland, in the year 1819, the appellant was not bound to prosecute his appeal and transmit the record until the term next after the approval of the appeal-bond.

DEBT on an appeal-bond, dated 5th June, 1819, in the penalty

of \$42,000, with condition, which, after reciting the judgment of Charles county court in favor of Scott for \$20,000, and that the said John Law hath "prayed an appeal to the next court of appeals to be held for the western shore," says, "Now the condition of the above obligation is such, that if the above bound John Law shall not pursue the directions of the Act of Assembly of Maryland, entitled 'An Act for regulating Writs of Error and granting Appeals from and to the courts of common law within this Province,' at the next court of appeals to be held for the western shore, and prosecute the same writ with effect, and also satisfy and pay unto the said Alexander Scott, his executors, &c., or assigns in case the said judgment shall be affirmed as well all and singular the damages and costs adjudged by the county court aforesaid, as also all costs and damages that shall be awarded by the court of appeals aforesaid, then this bond to be and remain in full force and virtue, otherwise of no effect."

The declaration was in the common form for the penalty.

The defendant prayed oyer of the bond and condition; and the indorsement of the judge approving the bond, in these words: "Approved by me, one of the associate judges of the first judicial district of Maryland, June 15th, 1819, J. R. Plater;" and pleaded general performance; to which the plaintiff replied, "that the said John did not pursue the directions of the said Act of Assembly in the said condition mentioned at the said next court of appeals, for the western shore, then ensuing; and did not pursue the method and rule of the prosecution of the said appeal in the manner and form in the said Act mentioned and expressed; but altogether failed and neglected, at the said next court to cause a transcript of the full proceedings of the said court in the said condition named, from whence the said appeal was made, as in the said condition mentioned, to be transmitted to the said court of appeals, at the said next court, and also wholly failed and neglected to file in the same court, namely, at the said next court, in writing, according to the rule of the same court, such causes or reasons as he had for making the said appeal; and did not prosecute his appeal, mentioned in the said condition of the said obligation, at the next court of appeals of the State of Maryland for the western shore; which the said Alexander avers was begun and held at Annapolis, in the said State, on the second Monday of June, in the year 1819, as he was bound to do by the said obligation and the condition thereof; but that the said John in his life," &c., "altogether omitted and failed so to do; and continued so to fail and omit to prosecute the said appeal until the first Monday of December in the said year, which was the second term of the said court of appeals after the execution of the said

obligation ; and so the plaintiff says that the condition of the said obligation was broken ; by reason whereof the plaintiff has sustained damage to the value of \$52,000 ; and this he is ready to verify," &c.

To this replication the defendant rejoined ; " that the said John Law did, immediately after the rendition of the said judgment of the Charles county court, pray an appeal from the said judgment ; and thereupon directed the clerk of the said Charles county court to make out the record of the said judgment and send the same to the said court of appeals, as he the said clerk was bound to do ; and that the said John did well and truly prosecute the said appeal with effect ; and that the said judgment was afterwards, namely, on the second Monday in June in the year 1822, by the judgment of the said court of appeals, reversed, as by the record of the said appeals now remaining in the said court of appeals will appear ; and this the said defendant is ready to verify," &c.

To this rejoinder there was a general demurrer and joinder.

The Act of Maryland referred to in the condition of the bond was the Act of October, 1713, c. 4, § 4.

Mr. Jones and *Mr. Ashton*, for the plaintiff, contended that the bond, although not approved until after the second Monday of June, 1819, the day of the commencement of the June term of the court of appeals, related back to the fifth day of June, the date of the bond ; and that therefore the defendant was bound to prosecute his appeal, and transmit the record, at the June term of the court of appeals ; whereas he did not prosecute it and transmit the record until the December term. That it was not the duty of the clerk of Charles county court to transmit the record, and that his failing to do so was no excuse for the delay of the defendant. That the bond takes effect from its delivery ; and the delivery is presumed to be made at its date, unless the contrary be shown.

Mr. Key, contra. The bond was not to be delivered to the party, but to the clerk ; and the clerk could not receive it until it was approved, so that until it was approved it could not be delivered ; and as it was not delivered until after the first day of the June term, the next court mentioned in the condition was the December court.

CRANCH, C. J., at May term, 1825, after stating the pleadings, delivered the opinion of the Court, as follows :

We think the rejoinder is bad, because it does not answer all the breaches assigned in the replication.

The replication assigns three breaches. 1st, That John Law did not, at the next court, cause a transcript of the record to be

transmitted to the court of appeals. 2d, That he did not, at the next court, file in writing his causes or reasons for making the appeal; and 3d, That he did not prosecute his appeal at the court of appeals, held at Annapolis on the second Monday of June, 1819.

To the first breach, the rejoinder answers that J. L. immediately after the rendition of the judgment, prayed an appeal and directed the clerk of the county court to make out the record and send it to the court of appeals. This is no excuse for not causing the transcript of the record to be sent. It was not the duty of the clerk to send it; nor even to make out the transcript unless his fees were paid or secured; and there is no averment that they were either secured or paid.

The second breach is not answered at all; but as the replication does not set forth the rule of the Court on that subject, we think the assignment of this breach is bad, and the defendant is not bound to answer to it.

The answer to the third breach is that J. L. prosecuted his appeal with effect; and that the judgment of the county court was reversed.

The question, whether this is a sufficient answer to the third breach, depends upon the question whether J. L. was bound by his obligation, at all events, to prosecute his appeal at June term, 1819.

The condition of the bond is that he shall pursue the directions of the Act of Maryland, 1713, c. 4, at the next court of appeals to be held for the western shore. Next, after what? The judgment? or the date of the bond? or the approval of the bond? or the delivery of the bond? or, according to the words of the Act of Assembly, is it "the next court ensuing, before whom such appeal ought to be tried"? Certainly the directions of the act ought to be pursued at, or in, the court before whom such appeal ought to be tried; but these words designate the court, not the term of the court, in which the appeal should be tried; otherwise the legislature would not have used the expression, "before whom;" but, at which.

The principal object of the Act of Assembly was to ascertain the cases in which an appeal should be a *supersedeas* to the judgment below. It is reasonable to suppose, therefore, that the legislature had in view the time of the *supersedeas*, and intended that the appellant should prosecute his appeal as soon as possible after he had suspended the judgment by giving the necessary security.

The appeal was not to operate as a *supersedeas* until the security should have been approved by the justices of the court below. The term of the court, then, at which the defendant ought to

prosecute his appeal would be the court next after the approval of the security. In the present case it appears by the indorsement of the judge upon the bond, that it was not approved until the 15th of June, 1819, which must have been after the 2d Monday of June, the day appointed by law for holding the court of appeals. It might have been a matter of doubt whether the court, at that term, would have jurisdiction of the appeal; and the defendant could not know that the court would sit more than one day.

Being of opinion that the defendant was not bound to prosecute his appeal until the term next after the approval of his bond, we think the third breach assigned in the replication is bad, and that the defendant is not bound to answer it. This also disposes of the first breach; for the "next court" mentioned in the assignment of this breach is afterwards, in the same replication, explained to be the June term, 1819, to which term we do not think the defendant was bound to transmit the transcript of the record.

Upon the whole we think the replication bad in all its assignments of breaches; and that the judgment upon the demurrer must be for the defendant.

JESSE M. SEMMES AND WIFE v. J. H. SHERBURNE.

In trover by husband and wife for a conversion of the wife's goods before marriage, the declaration must conclude *ad damna ipsorum*.

TROVER by husband and wife for the wife's slave. The declaration averred the trover and conversion to have been before the intermarriage, and concluded to the damage of the husband alone.

After verdict for the plaintiffs with \$300 damages, at April term, 1824, *Mr. R. S. Cox*, for the defendant, moved in arrest of judgment that the declaration should have concluded *ad damna ipsorum*; and cited 1 Chitty's Pleading, 60, 61, 398; 2 Chitty, 49, 50, 59, 374; *Nelthorp & ux. v. Anderson*, 1 Salk. 114.

Mr. Morfit, contra, cited 2 Esp. N. P. 186; *Blackborn and Wife v. Greaves*, 2 Lev. 107; Esp. N. P. 201; *Countess of Rutland's case*, Cro. El. 377; 2 Bl. Com. 433; *Bloxam v. Hubbard*, 5 East, 407.

This objection had become important, as the husband had died before verdict, and his death had been suggested upon the docket at October term, 1823.

The COURT (THRUSTON, J., absent,) arrested the judgment. The surviving plaintiff had leave to amend, and a *venire de novo* was awarded, at May term, 1825. [*post.*]

Jones v. Kemper.

RICHARD JONES v. REUBEN KEMPER, Garnishee of Burnett Moore.

In an attachment under the Maryland Act of 1795, c. 56, if the garnishee be taken and held to special bail under the sixth section of that act, no judgment can be rendered against him until he has appeared.

The *capias* against the garnishee must not be to answer to the plaintiff "in a plea of trespass on the case," &c., but to appear at the return of the writ, to make answers to such interrogatories, in writing, as he should, by rule of court, be required to answer touching the property of the defendant in his possession or charge at the time of serving such writ of attachment, or at any other time; and render his body to prison, or pay the condemnation-money if judgment should pass against him. A judgment of condemnation may, for irregularity, be set aside at a subsequent term.

SCIRE FACIAS against the bail of the garnishee, upon a recognizance of bail taken before two justices of the peace.

CRANCH, C. J., with the concurrence of the other judges, on the 5th of May, 1825, delivered the following opinion.

Mr. Wallach, for the bail, moved to set aside the original judgment against Kemper, the garnishee, upon the ground that it was irregularly obtained; and to quash the execution issued thereon.

The facts and proceedings appear to be as follows: On the 29th of May, 1819, Richard Jones, the plaintiff, obtained an attachment under the Act of Maryland, 1795, c. 56, against Burnett Moore, returnable on the first Monday of June, 1819, which was returned, "Laid in the hands of Reuben Kemper." To this attachment Kemper, the garnishee, appeared, and in answer to interrogatories, denied that he had received for Burnett Moore any money that was his at the time the garnishee received it; and that he had no money of Burnett Moore's in his hands. He admits that he received money under a power from Moore, but received it to his own use as his own money. These interrogatories were answered on the 15th and 22d of June, 1819. On the 10th of July following the plaintiff became nonsuit in that attachment, and immediately caused another to be issued, under the same act, and upon the same cause of action, against the same defendant, Burnett Moore, containing a clause commanding the marshal to take the body of Reuben Kemper, the garnishee, "to answer to the said Richard Jones, in a plea of trespass on the case, &c., according to the Act of Assembly aforesaid," no Act of Assembly having been before mentioned in the writ of attachment. The warrant, however, of the justice to the clerk commands him to issue the attachment "according to the form of the statute in such case made and provided." This attachment was returnable on the fourth Monday of December, 1819, and returned "attached credits in the hands of Reuben Kemper, and *cepi*, 10th July, 1819."

On the 20th of May, 1820, the following recognizance of bail was filed.

"No. 44 appearances to December, 1819.

"Richard Jones, plaintiff.

“ Reuben Kemper, garnishee of Burnett Moore, defendant.

“ You, Joseph Gales and Philip R. Fendall, do jointly and severally acknowledge yourselves special bail for the said Reuben Kemper, in an action of trespass on the case brought by the said Richard Jones against the said Reuben Kemper, garnishee, in the Circuit Court of the District of Columbia, held for the county of Washington in the said district ; they acknowledge themselves to be content, this 15th day of May, 1820, before R. C. Wightman, Joseph Forrest.”

“ To the Honorable the Judges of the Circuit Court of the District of Columbia :

“ I, Reuben Kemper, hereby authorize and request Walter Jones, Esq. attorney-at-law, to appear for me in the above suit. Reuben Kemper.”

It does not appear from the papers that any appearance was ever entered for Reuben Kemper, the garnishee ; but it is stated in the *scire facias* that judgment was rendered against him at October term, 1821, whether by default or otherwise, does not appear, nor whether a *ca. sa.* was issued against Kemper and returned *non est*.

The writ of *scire facias* against the bail does not state that any judgment was rendered in the action in which they became bail. It says that they became bail, “ in a plea of trespass on the case, &c., by the said Richard Jones against the said Reuben Kemper, garnishee of B. Moore ” ; “ and that the said Richard Jones, by the judgment of the said court, recovered against the said Reuben Kemper, garnishee of the said B. Moore, as well the sum of five hundred and sixty-two dollars and eighty-two cents current money, a certain debt, as the sum of eleven dollars and ninety-three cents, which was adjudged by the said court to the said Richard Jones, on his assent, for his costs and charges by him about his suit in that behalf laid out and expended, whereof the said Reuben Kemper, garnishee of B. Moore, is convict as it appeareth of record.” There is no averment that this judgment was in the action in which they became bail. That was an action of trespass on the case ; this seems to have been an action of debt. All the forms of *scire facias* against bail, which I have seen, show that the judgment against the principal was in the suit in which the bail was taken. 2 Lilly’s Ent. 379, 380, 386, 387, 395, 403, 406, 407, 408, 410.

All the facts stated in this *scire facias* may be true, and yet it will not appear that the plaintiff ought to have execution against the bail. Therefore, if the first attachment has been discontinued, and if that discontinuance after the appearance and answer of the garnishee be not a bar to any further proceeding against him by the same plaintiff on the same cause of action, if the clause of

Jones v. Kemper.

capias ad respondendum in the attachment be such as is authorized by the statute of Maryland; if the recognizance of bail be such as the statute authorizes; if there be such a judgment against Kemper as is set forth in the *scire facias*; if there could be judgment by default upon a *cepi corpus* before an appearance; if such an action of trespass on the case by Jones against Kemper as is mentioned in the recognizance, was instituted and pending at the time of the recognizance; if a *ca. sa.* against Kemper was duly issued and returned *non est* before the issuing of the *scire facias*; yet I should be of opinion that this *scire facias* ought to be quashed, for we cannot award execution upon it. But I am strongly inclined to think that the judgment against Kemper was irregularly obtained by default before appearance upon the *cepi corpus*. It certainly would have been irregular, if the action had been, as the recognizance supposes, an action of trespass on the case by Jones against Kemper; and, by analogy, I should suppose it would be equally irregular in any case where a *cepi corpus* was the return.

On this ground, therefore, as the bail cannot have a writ of error, the judgment, I should think, ought to be set aside, and the *scire facias* quashed. I am also inclined to think that the recognizance of bail is not such as the Act of Maryland requires.

The condition of the recognizance ought to have been, as I conceive, that Kemper should appear at the Court, at the return of the writ, to make answers to such interrogatories in writing, as he should, by rule of Court, be required to answer, touching the property of the defendant in his possession or charge, or by him owing at the time of serving such writ of attachment, or at any other time; and should render his body to prison, or pay the condemnation-money, if judgment should pass against him. (See the Maryland Act, 1795, c. 56, § 5, 6.)

The recognizance is not taken in the right suit. It purports to be taken in an action of trespass on the case, brought by Richard Jones against Reuben Kemper. No such action had been commenced; nor did the clause of *capias* in the writ of attachment warrant the justices in thus naming the case. That clause commands the marshal "to take the body of Reuben Kemper, to answer to the said Richard Jones, in a plea of trespass on the case, &c." If this "&c." had been extended, it would probably have been in these words, "brought by the said Richard Jones against the said Burnett Moore," and not, as the justices seem to have understood it, "brought by the said Richard Jones against the said Reuben Kemper." If it should be said that this clause of *capias* was the commencement of such an action of trespass on the case by Jones against Kemper, then it ought to have been

Bank of Washington v. Brent.

followed by a declaration, before judgment could have been taken against Kemper by default; and upon that ground the judgment ought to be set aside.

Inasmuch, then, as the recognizance is not taken in the right suit, and has not the condition required by the Act of Maryland, I think the *scire facias* should be quashed.

If the clause of *capias* in the writ of attachment is to be understood as commanding the marshal to take Kemper to answer to Jones in a plea of trespass on the case brought by Jones against Kemper, it is a clause not warranted by the Act of Maryland, which does not authorize the plaintiff to maintain an action of trespass on the case against the garnishee; and no such action would lie either at common law or upon the custom of London. The Act of Maryland only authorizes a *capias* to bring in the garnishee to answer interrogatories, and to abide the judgment of the Court; not to answer the plaintiff's original cause of action.

If the clause of *capias* was not warranted by the Act of Maryland, the recognizance of bail taken upon it, cannot support an execution. It is void.

If the *scire facias* had stated that judgment had been rendered for the said R. Jones, against the said R. Kemper, in the said plea of trespass on the case, then these defendants might have pleaded "no such record," generally. And now, I suppose, they might plead, (according to the precedent in 2 Lilly's Ent. 410,) "that no judgment for the said R. Jones, against the said R. Kemper, (after the time of the recognizance aforesaid, acknowledged, and before the issuing of the said writ of *scire facias*,) in the said action in the recognizance aforesaid, mentioned in the said court here, ever existed;" and certainly no such judgment could be produced, for no such action has ever existed.

Upon the whole, I think the judgment against Kemper must be set aside for irregularity, — upon the authority of *Ault v. Elliot*, special bail of Mortè, in this Court, [*ante*, 372,] — and the writ of *scire facias* quashed.

Judgment set aside and *scire facias* quashed.

BANK OF WASHINGTON v. W. BRENT, JR.

In case of an attachment by way of execution, if there be no appearance of the principal debtor, or garnishee, or other proceeding at the return term of the writ, the attachment is discontinued.

ATTACHMENT, by way of execution upon a judgment of the Court, laid in the hands of F. May, and B. Thruston, and returnable to October term, 1822.

Mr. Hall as *amicus curiæ* suggested that the suit was discontinued, as no appearance had been entered for the principal debtor or garnishees, nor any further proceedings had at the first term.

The COURT (THRUSTON, J., not sitting,) decided that the cause was discontinued.

Mr. Wallach, for the plaintiffs.

JOHN H. BAKER, Administrator of W. Bayly, v. GEORGE FRENCH *et al.*, terre-tenants of Ariana French, Executrix of George French, deceased.

If some of the terre-tenants named in the *scire facias* are returned "*nihil*," an *alias scire facias* must be issued against them, or the cause will be discontinued. *Scamble*, that the *scire facias*, or its return, must describe the land held by each tenant.

SCIRE FACIAS against the terre-tenants of Ariana French, executrix of George French, deceased.

The writ stated that William Bayly, in June, 1812, recovered judgment against Ariana French, executrix of George French, for \$501.87; and at the time of the rendition of the judgment against her, she was seized in fee of divers lands and tenements, and that execution remains to be made of the judgment; and that she has since departed this life; therefore the marshal was commanded to give notice to George French, Robert French, Virginia French, Elizabeth Weems, and Mariamne C. French, widow of Charles French, terre-tenants of the lands and tenements in his bailiwick being, whereof the said Ariana French, executrix, as aforesaid, was seized on the 6th of June, 1812, on which day the said judgment was rendered, or ever afterwards, that they appear before the Court, &c., on the 1st Monday of October, 1823, to show cause, &c., why the said William Bayly should not have his execution to be levied on those lands and tenements, &c.

The marshal returned, "*scire feci* George French; and *nihil* as to the others."

Mr. J. Dunlop, for George French, the only terre-tenant summoned, moved the Court to quash the *scire facias*, or to order it to be stricken off the docket as discontinued.

1. Because the original judgment did not bind the lands of the executrix.

2. Because only one of the tenants was summoned, and no *alias scire facias* against the others.

3. Because the lands are not described in the *scire facias*, nor in the return. 2 Tidd, 1038.

 Baker v. French.

Mr. Ashton, contrà. Under the testamentary law of Maryland of 1798, c. 101, the judgment against an executor or administrator is *de bonis propriis*, in the first instance, being for the plaintiff's proportion of assets only, and is an original judgment, binding the person and property of the executrix in the same manner as if she had not been sued in that character.

The return of the marshal is good. He has no authority to ascertain and describe the lands holden by the tenants, nor whether they were tenants of the freehold. It is not necessary that the judgment should be against all who are named terre-tenants in the *scire facias*. The defendant may plead in abatement, that there are other terre-tenants not summoned. If the return is defective, it is no reason for quashing the writ of *scire facias*.

Mr. Dunlop, in reply. It is impossible for the Court to render judgment, unless the land, held by the terre-tenants summoned, be described either in the writ of *scire facias*, or in the return. The judgment is not against the tenant, personally, but against the land. The forms of returns show that the sheriff always describes the land held by the tenant summoned. 2 Har. Ent. 174.

But the action is discontinued by the omission to sue out an *alias* writ of *scire facias* against the terre-tenants not summoned upon the first writ. Tidd, 1042; *United States v. Parker*, 2 Dallas, 373, and *Nicholls v. Fearson*, at this term, [*ante*, 526.]

MAY 26, 1825. The COURT, having taken time for consideration during the vacation, was of opinion that the cause was discontinued by the plaintiff's neglect to take out an *alias* writ of *scire facias* against the terre-tenants not summoned upon the first writ.¹

¹ In *Adams v. Terre-tenants of Savage*, 3 Salk. 321, it was held by Holt, C. J., that where a *scire facias* against terre-tenants is general, it is not proper for the defendant to plead in abatement, that there are other terre-tenants not named, and so pray judgment of the writ *et quod breve cassetur*; but to pray judgment, whether without them, *respondere debet*; but where the *scire facias* is particular. (i. e., naming the particular tenants,) in such case the defendant may pray judgment of the writ. See, also, *Michell v. Croft*, Cro. Jac. 506; S. P. on Demurrer. In Co. Ent. 619 a, is a form of *scire facias* and return against terre-tenants of W. H. After reciting the judgment, and dying, seized, &c., the sheriff is commanded to make known to "the tenants of the lands and tenements which were of the said W. H., on the octave of St. Hillary, 33 Eliz., on which day the judgment aforesaid was rendered, that they be here at this day, viz., &c., to show cause, &c., why the debt and damages aforesaid ought not to be made of those lands and tenements," &c.; and the sheriff returned that he had made known to Thomas Hunt, knight, tenant of the manor of Baconsthorpe Weodal, with the appurtenances in Baconsthorpe, in his county, and of the manor of Bodham Hall, with the appurtenances in his county, &c. &c. And to Thomas Armiger, gentleman, tenant of eighty acres of land in Bodham, &c. &c., as to the other terre-tenants, being eleven in all. "And thereupon the plaintiff prays execution against the said Thomas Hunt," and the other tenants named in the return "of the debt and damages aforesaid, of those lands and tenements to be adjudged to him," &c.

LAWRENCE GREATRAKE v. DANIEL BROWN.

In an action against the indorser of a promissory note, made in the name of a firm, it is not material that the partnership of the makers had been dissolved before the making of the note, it being the renewal of a note given during the existence of the partnership.

Demand of payment on one of the firm is sufficient to charge the indorser.

A written notice of the dishonor of the note, left at the dwelling-house of the indorser, is sufficient.

If the maker is not found at his office or his dwelling-house, on the last day of grace, so that payment of the note cannot be demanded, the note is dishonored.

ASSUMPSIT against the indorser of a promissory note, signed "Van Zandt & Rockwell," at sixty days, dated April 9th, 1822.

At the trial, the defendant, by his counsel, *Mr. Lear*, demurred to the evidence, and the plaintiff, by his counsel, *Mr. Fleet Smith*, joined in demurrer.

The evidence was, that the note was made by Van Zandt, in the name of "Van Zandt & Rockwell," on the day of its date, and indorsed by the defendant before it was due. That, on the 11th of June, 1822, Michael Nourse, a notary-public, called at the office of Van Zandt & Rockwell, a little after 3 o'clock, and found it locked. That he then went to Van Zandt's house, and inquired for him, and was told by a servant coming out of the house, that Van Zandt had gone out to dine. That he made no further inquiry for Van Zandt, nor any inquiry for Rockwell, having an impression that Rockwell was absent in the western country, but had no knowledge of that fact. That the next day he called at Mr. Brown's, the indorser's, dwelling, to the best of

In Co. Ent. 624, (a.) To a *scire facias* against terre-tenants, there is a plea in abatement, that the reversioner after an estate for years, of part of the lands, is not returned as tenant of the freehold.

Clerk v. Hardwick, Moore, 524. To a *scire facias* against terre-tenants not named in the writ, a tenant summoned, may plead joint-tenancy with another not named in the return, "and pray judgment whether he ought to be compelled to answer to the writ aforesaid, in form aforesaid returned." Writ abated.

In *Jefferson v. Morton*, 2 Saund. 23. To a *scire facias* against terre-tenants, those returned as such pleaded that one Richard Jackson was and is a tenant of a messuage commonly called, &c., of which the debtor died seized in fee, and that no writ of *scire facias* had issued against that tenant, whereupon they prayed judgment whether they ought to be compelled to answer to the writ; and then the entry on the record was: "And thereupon the said Jefferson, (the plaintiff,) in order to obtain justice more expeditiously in this behalf, prayed the writ of *scire facias* against the said Richard Jackson."

In *Michell v. Crofts et al.* 2 Roll. Rep. 53, which was a *scire facias* against terre-tenants, five of them appeared and pleaded that there is another tenant, viz., one K., not returned by the sheriff, and demanded judgment whether they ought to answer before K. should be summoned; to which plea the plaintiff demurred. Judgment, that the writ of *scire facias* be quashed, and a new writ issued against K. and the others.

 The Corporation of Washington v. Strother.

his recollection, and delivered notice in writing, of the dishonor of the note, to a servant whom he believed to be a servant of the family, or some other person of the family, but has no recollection of the particular person; and that he never delivered, as he recollects, more than one notice to Mr. Brown, and he believes this to be the one which is filed in this cause.

That Van Zandt & Rockwell had been in partnership, and that their partnership had been dissolved, and notice of such dissolution given in the public newspapers of Washington City, on the 19th of February, 1822. That Rockwell was in the western country when the note became payable. That the office aforesaid of Van Zandt & Rockwell, where the notary called, is the same office in which they did business when in partnership. That the note, filed in this cause, was given in renewal of a former note made by Van Zandt & Rockwell, while in partnership.

Judgment for the plaintiff, on the demurrer. See Chitty, 35, 47, 180; *Cromwell v. Hinson*, 2 Esp. Rep. 512; 5 Ib. 175; Chitty, 236, note; Id. 409.

 THE CORPORATION OF WASHINGTON v. JOHN STROTHER.

Under the by-law of the Corporation of Washington of the 16th of August, 1809, a person who suffers and permits a faro table to be set up and kept in his house, is liable to a separate prosecution for every day he shall so have suffered and permitted it to be set up and kept.

This was an appeal from the judgment of a justice of the peace for the county of Washington, who had *non-prossed* the Corporation of Washington upon five separate warrants issued against the appellee for suffering and permitting a faro table to be set up and kept in his house on five several days, viz., the 1st, 2d, 3d, 24th, and 25th of December, 1823. The three warrants, for the first three days, were all issued on the 29th of December, 1823, returnable on the 2d of January, 1824. That for the 25th of December was issued on the 2d of January, 1824, returnable on the same day, and that for the 24th of December was issued on the 5th of January, and returnable on the same day. On the 10th of June, 1824, the justice *non-prossed* them all, with costs against the corporation, who appealed from the judgments. Upon hearing of the appeals, the facts were fully proved, as alleged in the warrants respectively.

By the 2d section of the by-law of the corporation, of the 16th of August, 1809, it is enacted, that "if any person" "shall permit any" "faro table" "to be set up, kept, or played, in his or her house," &c., he or she "shall incur the penalty of twenty

dollars for every day, or less time, that the same is so kept up and maintained; to be recovered before a single magistrate; one half whereof shall go to the informer, and the other for the use of the city council."

A doubt was suggested at the bar, whether the party could be prosecuted separately, for any number of days on which he continued to keep and maintain the faro table prior to the issuing of the first warrant, or whether it was not one continued offence up to the time of prosecution, as this Court had decided, in *Alexandria*, in regard to the retailing of spirituous liquors, in the cases of *Commonwealth v. Smith*, 1 Cranch, C. C. 46, and *United States v. Gordon*, Ib. 58 and 81. See, also, *Marriott v. Shaw*, Comyns' Rep. 274.

Mr. Wallach, for the corporation, contended that each day's keeping constituted a separate and distinct offence. *Brooke v. Milliken*, 3 T. R. 509; *Crepps v. Durden*, Cowp. 640.

The COURT (CRANCH, C. J., not concurring,) ordered the judgments to be reversed, with costs, and judgment to be entered against the appellee, for twenty dollars and costs in each case.

CRANCH, C. J., wished for time to look into the authorities, and was inclined to be of opinion that all the time of keeping the faro table, before the first conviction, constituted but one offence, and that the amount of the penalty was to be regulated by the number of days' keeping, at the rate of twenty dollars a day.

ELLICOTT v. WALTER SMITH, Garnishee of Lanahan & Bogart.

If the garnishee in an attachment under the Maryland Act of 1795, c. 56, is only one of the members of a mercantile company indebted to the defendants, he cannot be chargeable alone as garnishee; nor can the garnishee be charged upon interrogatories, unless he admits that he is indebted to the defendant.

ATTACHMENT under the Maryland Act of 1795, c. 56.

CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., doubting.)

The garnishee, in answer to interrogatories, says that he is one of the firm of "The Georgetown Importing and Exporting Company," and that by reason of certain losing and disadvantageous sales of the property of that company, by the defendants, Lanahan & Bogart, there then remained, on the books of the said defendants, a balance against the said company of \$379.74, as he has been informed by the said defendants, and believes to be the fact; which balance they have claimed to have allowed them in the settlement of their accounts with the said company. He fur-

ther says, that he has tendered to the defendants, L. & B., an equal proportion, with the other creditors of the said company, of such portion of the said company's funds as was held to secure his own individual claims.

The question is, whether upon this answer the Court can render judgment against Mr. Smith, the garnishee.

We think we cannot. He is not individually and solely indebted to the defendants. If they had brought suit against him he might have pleaded in abatement that there were other partners not named in the writ. But his answer does not even admit that the company is indebted to the defendants; it only admits that they claimed to have the balance of accounts upon their books, allowed in the settlement. We are inclined to think that all the partners of the company should have been made garnishees. No one of the company should be charged unless upon his own oath or plea. However this may be, we think the answer does not admit a balance due by the company to the defendants.

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AVERILL v. TUCKER, Treasurer of the United States, and Edwards, Garnishees of N. Cutting.

Quære, whether the treasurer of the United States can be obliged to appear as garnishee, and is liable to judgment for money in his hands as treasurer.

An agent for the payment of the salaries of the clerks in an executive department of the government is bound to appear as garnishee when summoned.

Quære, whether the salary of an officer of the United States is liable to attachment.

ATTACHMENT upon a judgment under the Act of Maryland, 1795, c. 56.

The attachment was laid in the hands of Lewis Edwards, agent for payment of the salaries of the officers in the department of war, and in the hands of Thomas Tudor Tucker, treasurer of the United States.

The defendant, Nathaniel Cutting, was a clerk in the war department at a salary of \$1600 per annum payable quarter-yearly on the 1st of January, April, July, and October. The garnishees Edwards and Tucker were summoned on the 1st of April, 1823, before which day Mr. Cutting had drawn bills on Edwards, which he had accepted for the whole amount which would become due to Mr. Cutting on that day.

CRANCH, C. J., delivered the opinion of the Court.

This cause comes before the Court on a motion by *Mr. Swann*, Attorney of the United States for this district, *ex officio*, to quash or dismiss the attachment, no other garnishee being warned, and

no other effects attached. On the part of the United States, it is contended that the garnishees are public agents, and as such received the money; for which they are accountable to the United States, and for which they are not liable to the suit of any individual.

On the part of the plaintiff it is contended, that the Act of Maryland has no exception. That the public character of the treasurer of the United States does not exempt him from obedience to the summons, nor from liability to pay to the plaintiff the money due by the United States to the defendant, if such should be the judgment of the Court. The question depends, not on the official character of the person, but upon the nature of the thing to be done. *Marbury v. Madison*, 1 Cranch, 171; *Little v. Barreme*, 2 Cranch, 169. It is also contended that Edwards is not a public officer *quoad hoc*.

Whether money due from the United States to an individual may be attached in the hands of an officer, or agent of the United States holding it in that capacity, is a question of considerable importance. In the case of *Hodgson v. Dexter*, 1 Cranch, 345, it was decided that a public agent, contracting for the United States, is not personally liable upon the contract; and surely the law will not raise an implied contract against a public agent who would not be bound by an express agreement. Mr. Cutting could not have maintained an action against the treasurer of the United States for his salary.

The liability of Mr. Edwards may be different. Can the money, while in his hands, be considered as in the custody of the United States? or as the money of the United States? It has gone out of the treasury with all the usual forms. Is it charged to him on the books of the treasury? or is it charged to the respective officers whose salary he receives? Is he accountable to them, or to the United States? His official character, whatever it may be, does not appear in the record. That of Mr. Tucker appears by the return of the attachment.

We think that Mr. Edwards must appear to the attachment and defend himself. The official character of Mr. Cutting does not appear in the record, and therefore we cannot come at the question, whether the salary of a public officer of the United States can be attached so as to starve him out of office. At present we have nothing before us but the writ of attachment and return; so that we cannot decide the points intended to be submitted to the Court.

Mr. Edwards afterwards appeared as garnishee and pleaded, that when the attachment was served on him, and for a long time before, he was and had been a clerk in the war department.

That according to the usage of the department of war, a general warrant for the payment of the salaries of the officers in the war department was usually drawn from time to time as the salaries became due in favor of him the said Lewis Edwards, and that according to the said usage a general warrant for the payment of sundry salaries, becoming due on the 1st of April, 1823, was drawn by the secretary of the treasury in favor of him the said Lewis Edwards, agent for paying the said salaries, which warrant was carried through the necessary forms of the government, and the money placed by him in the office of discount and deposit at Washington to the credit of the said Lewis, agent for paying salaries as aforesaid; and that among the officers to whom the said money was to be distributed was the said Nathaniel Cutting, who became entitled, on the said 1st day of April, 1823, to \$400 for one quarter's salary as clerk in the said war department, which said quarter's salary was payable to him, the said Nathaniel, when he should obtain from the treasurer of the United States his check for the payment of the same; which he never did obtain, and the said sum never was, in fact, in his hands as the money of the said N. Cutting, and therefore he saith that at the time the attachment was levied in his hands as aforesaid he had not in his hands any of the moneys or credits of the said N. Cutting, subject and liable to the attachment aforesaid.

And the said Lewis Edwards for further plea saith, that before the said quarter's salary became payable to the said N. Cutting as aforesaid, that is to say, between the 25th of November, 1822, and the 5th of March, 1823, he, the said N. Cutting, drew divers orders in favor of divers persons for different sums of money amounting altogether to \$400, upon the said Lewis Edwards, agent as aforesaid, which said orders were drawn upon the credit of his said quarter's salary becoming due as aforesaid on the said 1st day of April, 1823, as aforesaid, which said orders were accepted by him the said Lewis before the attachment aforesaid was levied in his hands, and so the said Lewis saith that at the time of the service of the attachment aforesaid there was no money, and could not have been any money of him the said N. Cutting in his hands which could be subject or liable to attachment as aforesaid, and this he the said Lewis is ready to verify, &c.

To the first of these pleas the plaintiff by his counsel, *Mr. Morfit*, demurred, and to the other joined issue upon the fact.

Upon this demurrer, the Court, at May term, 1826, was of opinion that Mr. Edwards was to be considered as an agent of the government, and that neither he nor the treasurer of the United States could be sued for the salary by Mr. Cutting, and therefore not liable as garnishees; and that if they could be sued

as garnishees, it did not appear by the case agreed, (which was the same matter stated in the pleas,) that there were any effects, moneys, or credits, of Mr. Cutting in their hands at the time of the service of the writ of attachment.

The plaintiff thereupon discontinued his suit.

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GRIFFITH COOMBE v. THOMAS MEADE *et al.*

If the plaintiff has a legal claim he must pursue his remedy at law, as far as he can, before resorting to equity.

BILL IN EQUITY. CRANCH, C. J., delivered the opinion of the Court.

The bill states that a judgment at law had been recovered by the Bank of the Metropolis against the complainant, G. Coombe, as indorser of Simon Meade's note, made payable to and indorsed by Thomas Meade, and that the complainant paid to the Bank of Washington \$280 with interest upon another note of Simon's indorsed by Thomas and the complainant, which notes had been discounted for the accommodation of Simon or Thomas. That Simon purchased of Thomas Law a city lot in Washington, upon which there is still a small part of the purchase-money due to Mr. Law. That Simon took possession of the lot under his purchase, and assigned his right in it to Thomas Meade. That the legal title yet remains in Thomas Law. That Simon died leaving a widow and children, who are made defendants. That the complainant has received no part of the notes, although he has requested the administratrix and the said Thomas Meade to pay them; the administratrix alleging that she has not assets, and Thomas Meade alleging and giving out "that he has made over the lot as a gift to one of Simon's children, which if true is fraudulent and void;" and that the said Thomas Meade alleges and pretends that he has no means of paying the said notes, "so that by these fraudulent contrivances your orator may be deprived of said debts and defeated from the recovery thereof, unless by the aid of this honorable Court." In tender consideration whereof, &c., "and that the said lot may be decreed to be sold to satisfy the judgment and note aforesaid, with costs, damages, and interest; and that T. Law may render an account of what is due on the lot, and may convey the legal title to the purchaser, upon receiving the balance of the purchase-money, the complainant prays *subpæna*, &c., and for general relief."

To this bill the resident defendants, Thomas Meade and Jane Gorman, one of the children of Simon Meade, demurred for want of equity as against them, and contend, by Mr. Worthington,

their solicitor, that the complainant has a legal remedy which he must show he has pursued as far as he could, before he can ask the aid of a court of equity.

In the case of *Brinkershoff v. Brown & others*, 4 Johns. Ch. Ca. 671, Chancellor Kent says, "But I am sorry to say that the plaintiffs have not shown enough when they only show themselves to be judgment creditors. If they want relief touching the personal assets of their debtor, they must show that they have taken out execution at law, and pursued it to every available extent against the property, before they can resort to this court for relief. I apprehend this to be the settled rule in Chancery; and that this court does not as of course assume jurisdiction in taking executions upon judgments at law into its own hands. Such power would be oppressive to the debtor and to the court. The presumption is that the court which renders judgment is competent to enforce it; and it is only in special cases, in which property cannot be found to satisfy it, that this court interferes to discover and reach the property. But the legal remedy by execution must first be tried. This court is not to know by anticipation, that it will be ineffectual. Upon such an allegation, it might assume the collection of all simple-contract debts in the first instance, without even requiring the creditor to prosecute his demand to judgment at law. It is sufficient, however, to observe, that I find the rule to have been long and uniformly established, that, to procure relief in equity by a bill brought to assist the execution of a judgment at law, the creditor must show that he has proceeded at law to the extent necessary to give him a complete title."

"If he seeks aid as to real estate, he must show a judgment creating a lien on such estate. If he seeks aid as to personal estate, he must show an execution giving him a legal preference, or lien upon the chattels." And the chancellor cites the following cases: *Wiggins v. Armstrong*, 2 John. Ch. Rep. 144; *Hendricks v. Robinson*, Id. 290; *Angell v. Draper*, 1 Vern. 399; *Batch v. Wastall*, 1 P. Wms. 445; *Shirley v. Watts*, 3 Atk. 200; *King v. Marissal*, 3 Atk. 192; *Bunden v. Kennedy*, 3 Atk. 379; *Scott v. Scholey*, 8 East, 467; *Mountford v. Taylor*, 6 Ves. 786. And he says, "some of these latter cases are peculiarly forcible, since they require a previous execution at law, even in cases in which the creditor is pursuing a mere right in equity, not tangible at law, or vendible under a *fi. fa.*"

In the present case of *Griffith Coombe v. Thomas Mead et al.* the bill does not state that the complainant has even commenced a suit at law against either of the Meads, nor that their estates are insolvent; nor that there is no other property which can be reached by an execution at law. Nor does it state that the com-

plainant has satisfied the judgment obtained against him by the Bank of the Metropolis. The bill charges no fraud in Simon Meade's assignment to Thomas Meade; nor does it seek to charge the lot as the real estate of Simon. Admitting that the conveyance from Thomas Meade to one of Simon's children was fraudulent and void, yet the bill lays no ground for the complainant's proceeding in equity against Thomas, or his property; and admitting all the averments in the bill to be true, he may still have a complete remedy at law.

It seems to us, therefore, that there is no such equity stated in the bill, as will give this Court, as a court of equity, jurisdiction of the cause.

3 MAY, 1825. The COURT (*nem. con.*) rendered judgment for the defendants on the demurrer.

See also *Williams v. Brown*, 4 John. Ch. Rep. 682, and *McDermott v. Strong*, Id. 687.

CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1825, AT ALEXANDRIA.

RICHARD GARDNER v. THE COLUMBIAN INSURANCE COMPANY.

An offer to abandon the insured vessel, made as soon as the assured obtains the preliminary proofs of loss, to be laid before the underwriters, is not too late.

Upon a valued policy, evidence of overvaluation is not admissible unless in support of an allegation of fraud.

THIS was an action upon a policy on the brig *Manufactor*, at and from Rio to Santos, valued at \$3200.

The defendants, at the trial, contended that the vessel was fraudulently overvalued, and that the offer to abandon was too late.

The policy was dated 20th November, 1821. The loss was known here on the 24th of November. On the 26th of December, the protest and offer to abandon were sent to the office of the defendants, and the offer to abandon was repeated in writing on the 23d of January. The master arrived in Philadelphia on the 12th of December. There was no evidence of the arrival of any authentic proof previous to that date.

The COURT (THRUSTON, J., absent,) said the offer to abandon was not too late.

They also said that evidence of overvaluation could be given only in support of the allegation of fraud. That overvaluation is not, *per se*, evidence of fraud, but was a circumstance proper for the consideration of the jury in considering the question of fraud; and that if they should find that the vessel was fraudulently overvalued, the plaintiff could not recover, even the value of the property, for the fraud would invalidate the contract altogether.

Verdict for the plaintiff, \$3200.

FENTON v. BRADEN, MORGAN, & Co.

If goods are shipped, by a merchant in England, to a mercantile house in this country, according to their order, they cannot refuse to receive them here; but, by receiving them, are not bound to pay the invoice price.

Bennett v. Adams.

The plaintiffs can recover only as much as the goods were worth at the time and place of shipment, if the defendants object to the invoice price in a reasonable time.

ASSUMPSIT for the price of flannels shipped by order of the defendants.

The defendants, thinking they were invoiced too high, had them appraised, and sold them.

Mr. Mason, for the plaintiff, contended that the defendants, having received and sold the goods, are bound to pay for them at the invoice price. If they did not like the price they should not have taken them.

Mr. Taylor, for the defendants. The receiving of the goods, without any explanation, would have been only *prima facie* evidence of agreement to the invoice price; but the act of receiving may, at the time, be explained by declarations and by acts. The defendants could not refuse to receive them, and did all they could to show that, by receiving them, they did not agree to the invoice price.

The COURT (THRUSTON, J., absent,) was of opinion that, as the goods were at the risk of the defendants, when put on board the ship at Liverpool, and the defendants had no agent there to accept, or refuse, or even to examine the goods and compare them with the invoice prices, and the defendants had given a general order for such goods, without any express agreement as to the price, the law will only raise an implied promise to pay as much as the goods were worth at the time and place of shipment. The defendants could not refuse to receive them, and oblige the plaintiff to take them back if they were such goods as the defendants ordered; and their receiving them here is no evidence of an agreement to pay the invoice price of them. But the receipt of the goods and of the invoice is *prima facie* evidence that the invoice price is the value, unless the defendants objected to that price in a reasonable time.

Verdict for the plaintiff, deducting $7\frac{1}{2}$ per cent. from the invoice price.

 BENNETT v. ADAMS.

When evidence is offered of what a deceased witness testified at a former trial of the same cause, that evidence must be of the very words of the deceased witness.
A power to release a debt cannot be proved by general reputation.

THE COURT (THRUSTON, J., absent,) decided, that when evidence is offered of what a deceased witness testified, at a former trial of the same cause, that evidence must be of the very words

Hodge's Executor v. Higgs.

of the deceased witness. It is not sufficient for the witness to state what he understood to be the substance or effect of the language of the deceased witness. *Phillip's Ev.* 199, Ed. N. York, 1820.

The COURT also decided that a power to release a debt could not be proved by general reputation.

Verdict for the plaintiff, \$63.68.

UNITED STATES v. ELIZABETH STOTT.

A bailiff cannot lawfully force himself into a house, by the outer door, (although partially opened by one within,) to make a distress for rent.

INDICTMENT for assault and battery upon one Theodore Meade, who was a constable employed by the landlord to levy a distress for rent. Having knocked at the outer door, it was partially opened by Mrs. Stott, but seeing the constable, she instantly endeavored to close it. The constable, having one arm and one leg in, forced it open and entered. Mrs. Stott then collared him and struck him with a bed-wrench, and seized his bag and threw it out of the window; and for this assault and battery she was indicted.

Mr. Hewitt, for the defendant, contended that the bailiff had no right to force the door open, under those circumstances, but was himself a trespasser, and cited *Lee v. Gansel*, Cowp. 1.

The COURT (THRUSTON, J., absent,) said that the bailiff had no right to force the door open, under those circumstances. That he could not lawfully use force to get in, although the door was partially opened by the defendant. It was like the case of a door fastened with a chain so as to allow it to be opened a few inches only. In *Lee v. Gansel*, Lord Mansfield doubted, whether, if the chamber of Gansel could be considered as his castle, and the door so far opened as to admit the thigh of the officer, he could justify forcing himself entirely in, so as to arrest Gansel.

Verdict, not guilty.

HODGE'S EXECUTOR v. HIGGS.

If the clerk who made the original entries in the testator's books, be made executor, those entries are competent evidence in an action by the executor for goods sold and delivered by the testator to the defendant.

ASSUMPSIT by the plaintiff, as executor of Hodge, for goods sold and delivered to the defendant in the testator's lifetime.

The original entries in the testator's books had been made by the plaintiff while he was the clerk of the testator, and having proved them to be in his handwriting, and made in the testator's lifetime, and that he was then his clerk, he now offered them as evidence of the sale and delivery of the goods.

Mr. Mason, for the defendant, objected that it was his voluntary act to qualify as executor; he might have refused to act.

The Court, however, (*nem. con.*) was inclined to the opinion that the original entries, under those circumstances, were competent evidence for the plaintiff, and permitted them to be read to the jury, saying that they would grant a new trial if satisfied that the opinion was wrong.

UNITED STATES v. RICKETTS' ADMINISTRATOR.

If the administrator of the surety in a collector's bond pay away the assets of his intestate in payment of the intestate's debts, before notice of the claim of the United States, such payment is not a *devastavit*.

The United States, in an action upon a collector's bond, cannot obtain judgment against the surety for more than the penalty of the bond.

DEBT upon the official bond of C. Simms, late collector for the port of Alexandria, in the penalty of \$10,000, and in which bond the defendant's intestate, J. T. Ricketts, was a surety. The defendant had paid away the assets of the estate of his intestate, J. T. Ricketts, in the payment of his debts, before notice of the claim of the United States for the balance due by the collector to them, amounting to \$17,000.

Mr. Hewitt, for the defendant, contended that the payment of the debts of the intestate, by his administrator, the defendant, was not a *devastavit*, and cited the case of *The United States v. Fisher et al.* 2 Cranch, 390, where C. J. Marshall, in a note, gives his own opinion, that such a payment without notice, is not a *devastavit*.

The question being submitted, this Court was unanimously of the same opinion, and also that in this action the judgment could not exceed the penalty of the bond.

Mr. Swann, District Attorney for the United States.

Mr. Hewitt, *Mr. Mason*, and *Mr. Taylor*, for the defendant.

OFFUTT'S EXECUTOR v. HENDERSON.

The English statute of West. 2, 13 Ed. 1, c. 45, which gives a *seire facias* to revive judgments in personal actions, is still in force, in Virginia, for that purpose.

Offutt's Executor v. Henderson.

The Act of Virginia of the 19th of December, 1792, § 5. limiting the time of issuing writs of *scire facias*, in certain cases, is an act of limitations, and must be pleaded. The defendant cannot avail himself of it by plea of *nul tiel record*, nor by motion to quash the *scire facias*, nor by motion in arrest of judgment. It does not apply to a case where an execution has issued and been returned.

SCIRE FACIAS, issued in May, 1824, to revive a judgment rendered on the 6th of December, 1805, in favor of the plaintiff's testator, against the defendant Henderson. Plea, "no such record," general replication, and issue.

Mr. Taylor, for the defendant, contended that it appeared upon the face of the *scire facias* itself, that it ought not to have issued, because the year and day since the judgment had elapsed, and the case was not within the provisions of the Virginia statute of the 19th of December, 1792, § 5, an execution having been issued and returned; and the act applies only to the case "where execution hath not issued," "or where execution hath issued and no return is made thereon." In the first of which cases, the plaintiff may have a *scire facias* within ten years after the judgment; and in the second case, may, within the ten years, have other executions, or move against the sheriff or his sureties, for not returning the same; but it makes no provision for a *scire facias*, in case an execution has been returned.

By the common law no execution could issue after the year and day, nor could the plaintiff in a personal action have a *scire facias*. A *scire facias* in such case was first given by the statute of West. 2, 13 Ed. 1, c. 45, but that statute, and all the other English statutes, which were, by an ordinance of the convention, in May, 1776, declared to be in force until the same should be altered by the legislative power of the colony, ceased to be in force upon the repeal, on the 27th of December, 1792, of so much of that ordinance as related to those statutes; so that there is now no law authorizing a *scire facias* in a personal action, except in the case where an execution has not issued. In the present case the *scire facias* is brought by the executor of the original plaintiff, which is a case not provided for by law.

Mr. Mason, for the plaintiff, *contra*. This question cannot arise upon the issue of *nul tiel record*. The statute of 19th December, 1792, § 5, is an act of limitations, and must be pleaded. *Gee v. Hamilton*, 6 Munford, 32.

Mr. Taylor, in reply. This is not an act of limitations, but an enabling act. An act of limitations supposes a previous right which it restrains; but we rely upon the want of authority in the Court to issue a *scire facias* at all in this case. If the issue of *nul tiel record* be found for the plaintiff, the defendant may still move in arrest of judgment.

CRANCH, C. J. The fifth section of the Act of Virginia, of the 27th of December, 1792, p. 291, repealing so much of the ordinance of the convention passed in May, 1776, as declared the English statutes to be in force until altered by the legislative power of the colony, saves to every person the right and benefit of every writ remedial and judicial which might have been legally sued out before the passing of that act, and with the like proceeding thereupon to be had, as fully as if the act had not been made. By this clause the right to the writ of *scire facias* to revive judgments is saved. The Act of the 19th of December, 1792, p. 108, § 5, was passed while the English statutes were in force; and must be considered as an act of limitations. It limits the action of debt as well as the *scire facias*. The question then is whether it must be pleaded; or may it be moved in arrest of judgment? The use of a special plea is to state what does not already appear upon the record. It would only state the date of the judgment and the time of the issuing of the *scire facias*, both of which already appear upon the face of the *scire facias*. If the statute of limitations had been pleaded the plaintiff might have replied an execution taken out within the year, which, although not returned, would, as I understand the act, take the case out of it as to the remedy by *scire facias*, although the plaintiff could not have a new execution or move against the sheriff; or the plaintiff might perhaps reply infancy, or imprisonment, or *non compos mentis*, or out of the district, or some other matter to avoid the bar. Perhaps these matters might be shown upon a motion to quash the *scire facias*; but I do not think they could be made to appear judicially to the Court upon a motion in arrest of judgment; and therefore I think the statute of limitations is not a good ground for such a motion. I believe the defendant's remedy is by motion to quash the *scire facias*; or by plea; but I think the Court should not now let in the plea, without affidavit of merits."

At the subsequent term, (November term, 1825,)

Mr. Taylor, stated that he was satisfied that he could not support a motion to quash the *scire facias*, but moved for leave to plead specially the statute of 19th December, 1792, § 5; and, as a ground for the motion, alleged that he had not supposed it necessary to plead it, as he was not aware that the statute of West. 2, giving a *scire facias*, was in force in Virginia, and offered to make affidavit of that fact, and that the defendant had instructed him to rely on the statute of limitations.

Mr. Mason, *contra*.

An execution was issued immediately after the judgment, and was returned, and the defendant was discharged under the insolvent act. The Act of the 19th of December, 1792, applies only

to a case where no execution has been issued ; or if refused, has not been returned. It does not apply to this case ; and therefore there would be no use in pleading it. The plea would be bad upon demurrer. There is no limitation but that which may be inferred from the lapse of time.

In 1816, a motion was made to issue an execution under the saving clause of the statute of 19th December, 1792, § 6. An execution was issued upon that motion and was returned. The plaintiff then died, and the executor was obliged to bring his *scire facias*.

The motion was continued under *cur. ad. vult.*, and *Mr. Mason* and *Mr. Taylor* were to examine the case further and furnish the Court with notes of authorities, &c. But the question does not seem to have been moved again.

WELFORD v. GILHAM.

A note given as indemnity to the bail, who had paid off a judgment obtained against his principal for a gaming debt, and for which the bail was liable and had become fixed before he received the note, was not a note, the consideration of any part of which was for money or other valuable thing won at any game, within the meaning of the Virginia statute against gaming.

A plea of the statute of gaming, to a promissory note, is substantially defective in not stating what debt or judgment the note was given to secure ; by what court the judgment was rendered, and the names of the persons who won and lost the money. The judgments which are made void by the Virginia statute against gaming are judgments voluntarily confessed by way of security for a gaming debt ; not judgments rendered *in invitum*.

The statute of Virginia makes void all contracts where any part of the consideration is money won at any game.

ASSUMPSIT, against the indorser of Farish's note. The defendant pleaded the Virginia statute of gaming of the 8th of December, 1792, (p. 174,) which makes absolutely void all contracts where any part of the consideration is for money or other valuable thing won at any game. General demurrer, and joinder.

Mr. Mason, for the defendant, cited *Woodson v. Barrett et al.* 2 Hen. & Mun. 80.

Mr. Wise, contra, cited *Alcinbrook v. Hall*, 2 Wils. 309.

CRANCH, C. J. The defendant was sued as indorser of one Farish's note, and pleaded,

1st. The general issue.

2d. That before the making of the note, the maker and one Boyd, "played together at a certain unlawful game at cards commonly called loo, for divers sums of money, upon tick and credit, and not ready money ;" and that Farish lost, and Boyd won divers sums of money amounting to \$410. "And afterwards there was instituted by the said Boyd against the said Farish upon his

promises and agreements to pay the said sums of money so lost as aforesaid, a suit at law in the court in the city of Baltimore, in which such proceedings were had, that the said R. G. Welford, the plaintiff, became and entered as the special bail for the said Farish; and thereafter a judgment was rendered in and by the said court against the said Farish for the amount of moneys so lost by him as aforesaid, and thereupon certain proceedings were had and commenced by the said Boyd against the said Welford as special bail as aforesaid, in order to make him liable for and pay the amount of the judgment aforesaid; when, in order to relieve the said Welford as special bail as aforesaid, the note in the declaration mentioned was drawn and made by the said Farish and indorsed by the defendant with the intent and for the purpose of relieving the said Welford as special bail as aforesaid, and of being delivered to the said Boyd, in lieu of the said Welford's engagement as bail as aforesaid, and to secure the payment of the judgment aforesaid; and for the purposes and considerations aforesaid, the said note so drawn and indorsed as aforesaid, was thereafter delivered to the said A. H. Boyd, who took and received the same and carried the said note to be placed for collection in the Bank of Potomac, in the town of Alexandria. And the defendant avers that the said plaintiff thereafter, well knowing the consideration upon which the said judgment had been rendered, and in which he had entered as special bail as aforesaid, and that the same was rendered for the said amount of moneys so lost at the game aforesaid, paid off and discharged the same, and then and there took and received the said note mentioned, well knowing the purposes and considerations for which the same had been so drawn, indorsed, and delivered as aforesaid; and the defendant says that by reason of the premises, and by force of the statute in such case made and provided, the said note was then and is wholly void; and this he is ready to verify. Wherefore," &c.

3d. The third plea is like the second, excepting that it avers that the note was placed in the Mechanics Bank of Baltimore, for collection, who placed it in the Bank of Potomac for collection; and that it was after the dishonor of the note that the plaintiff paid off the judgment and received the note.

4th. The fourth plea is, "that the note in the declaration mentioned was drawn and given, in part, to secure a certain debt and judgment which before that time had arisen and been rendered for certain moneys won at unlawful gaming; and that the plaintiff took and received the said note, well knowing the purposes and consideration for which the same had been so drawn and given as aforesaid; and the defendant says, that, by reason of the

Welford v. Gilham.

premises, and by force of the statute in such cases made and provided, the said note was and is wholly void, and this he is ready to verify," &c.

To the three last pleas there was a general demurrer and joinder.

The main question upon this demurrer is, whether the Virginia statute against gaming of the 8th of December, 1792, c. 96, is a bar to an action brought by the bail, (who was fixed upon a judgment against his principal for a gaming debt, and who paid off that judgment,) against the indorser of a note given to the bail for the amount which he had so paid. Or, in other words, whether it appears, by the pleadings, that any part of the consideration of this note was money won at cards, or other game, within the meaning of that statute?

It is stated in the second plea, that the note was made and indorsed for the purpose of relieving Welford as special bail, and with intent to secure the payment of the judgment; and that the plaintiff, having paid off the judgment, knowing it to be for a gaming debt, took the note, knowing the intent with which it was made, and its consideration. The plea does not state that at the time the plaintiff became bail, or at the time of the judgment against Farish, or at any time before the plaintiff was fixed, as bail, he knew it to be a gaming debt. It must therefore be taken as a fact that he was innocently bound for the debt, and could not, at law, discharge himself but by paying it; for I presume he could not have pleaded the statute in bar of the *scire facias*.

It is true that in second Institute, p. 470, Lord Coke, in his commentary upon the statute of 13 Ed. 1, c. 45, which gives the writ of *scire facias* to revive judgments in personal actions, says, "that the tenant or defendant, though he be stranger to the recovery, shall not plead against the recovery any thing that proveth it to be erroneous or voidable; but he may plead matter that proveth the recovery void; as that it was *coram non judice*, or the like." "Neither shall he, in a *scire facias*, plead any thing against the title or matter of the recovery, where he may have an action, and therein falsify the same." "But the tenant or defendant may plead divers matters, after the judgment given, to bar the plaintiff of execution, as outlawry, a release of actions," &c. And again, in p. 472, he says, "And seeing the words of the *scire facias* be, *quare executionem habere non debet*, the tenant or defendant may plead any thing in bar of execution, as hath been said before." It is true also that the Act of Assembly of Virginia against gaming, of the 8th of December, 1792, (p. 174,) declares, "that all promises, agreements, notes, bills, bonds, or other contracts, judgments, mortgages, or other securities or conveyances

Welford v. Gilham.

whatsoever, made, given, granted, drawn, or entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such promise, agreement, conveyances or securities, shall be for money, 'won' at any game, shall be utterly void, frustrate, and of non effect, to all intents and purposes whatsoever." Yet I am strongly inclined to think that the judgments contemplated by that act, are only such judgments as should be voluntarily confessed by way of security for the debt. The words are, "judgments, mortgages, or other securities or conveyances," "made, given, granted, drawn, or entered into, or executed," "by any person." These expressions do not seem to refer to judgments rendered, by a court, *in invitum*; but such as should be agreed beforehand to be confessed by way of security; which was a very common mode of giving security in England at the time of the statute of 9 Anne, c. 14, from which the Virginia statute seems to be copied so far as it makes judgments void. The British statute does not use the words "promises, agreements, and other contracts," which are in the statute of Virginia; but it has the words "judgments, mortgages, or other securities or conveyances," and the English courts have decided that although the security is void, yet the contract remains; upon which ground the case of *Robinson v. Bland*, 2 Burr. 1077, was decided in favor of the plaintiff; yet that judgment was for money knowingly lent at the time and place of play, and would have been void by the express words of the statute of Anne, unless the word "judgments," in that statute is to be restricted to judgments agreed to be confessed by way of security. If such a restricted construction be not given to the statute, the judgment in the case of *Robinson v. Bland*, was void the moment it was rendered; and the sheriff was a trespasser in serving the execution.

The judgment therefore of *Boyd v. Farish*, I apprehend, was not utterly void, so that the bail could avail himself of the statute by plea to the *scire facias*, as he could if the judgment had been *coram non iudice*. If then, the plaintiff, Welford, was bound at law to pay the debt, and could not discharge himself by plea to the *scire facias*; and if he paid off the judgment, as the plea states, before he received the note; and if the note was given to him for his indemnity, or in the words of the plea, "for the purpose of relieving the said Welford, as special bail as aforesaid," and to secure to him the payment of the amount of the said judgment which he had paid, or was bound, or was about to pay, (which I take to be a fair paraphrase, and to be the true meaning of the words, in the plea, "and to secure the payment of the judgment aforesaid,") then I think the facts stated in the plea do not show that any part of the consideration of this note,

Patriotic Bank of Washington v. Farmers Bank of Alexandria.

was for money, or valuable thing won at any game, within the meaning of the statute.

I do not perceive any material difference between the second and the third pleas.

The fourth plea I take to be substantially defective in not stating what debt or judgment the note was given to secure; by what court the judgment was rendered; and the names of the persons who won and lost the money.

I am, therefore, of opinion that the judgment upon the demurrer ought to be for the plaintiff.

The other judges concurred.

THE PATRIOTIC BANK OF WASHINGTON v. THE FARMERS BANK
OF ALEXANDRIA.

If a bank receives a note to be collected according to the known and established mode of transacting business at that bank, it is not liable for damages by omitting to demand payment on Saturday, when the third day of grace was Sunday; it being the known and established mode of transacting business in that bank, in such a case, not to demand payment until Monday.

ACTION on the case for negligence, in omitting to demand payment on Saturday, when the third day of grace was Sunday. The draft was dated on the 26th of June, 1818, at ninety days; and became payable on the 24th-27th of September.

The declaration averred that "the defendants received the bill to be collected according to the known and established mode of transacting business in the said Farmers' Bank," whereby they became bound to use due and reasonable diligence in collecting the money, and being so liable, undertook so to do; but did not, in this that they did not present the bill for payment on the 27th of September, 1818, but kept it up a long time after it became due, whereby the drawer and indorsers were exonerated, and the acceptor became insolvent, and the plaintiffs sustained damage, &c.

There was a verdict for the plaintiffs, subject to the opinion of the Court upon a case stated; the material facts of which are that the 27th of September, 1818, was Sunday; that payment was not demanded until Monday the 28th; that it was the known and established mode of transacting business in the said Farmers Bank, not to demand payment in such cases, until Monday; and that the plaintiffs only required the defendants to make the demand of payment according to the usage of their bank.

Per Curiam. It appears to the Court that upon the case stated

Negroes Peter and Lewis v. Cureton.

the plaintiffs cannot charge the defendants with negligence, and that judgment must be rendered for the defendants.

Judgment for the defendants.

ALEXANDER MOORE, Appellant, v. GEORGE S. HOUGH, Appellee.

If an entire debt of \$250, be settled by the debtor's giving his five several promissory notes for \$50 each, payable at different times; each note is within the jurisdiction of a justice of the peace; and if all the notes have become payable he may issue his five separate warrants, and render judgment against the debtor in each case.

APPEAL from the judgment of a justice of the peace in five several cases.

The appellant, being indebted to the appellee in the sum of \$250, gave his five several promissory notes to the appellee, payable at different periods. When they had all become payable he obtained from a justice of the peace five separate warrants, upon which the appellant was arrested, and judgment was rendered against him in each case; from which judgments he appealed to this Court.

Mr. Fendall and *Mr. Mason*, for the appellant, contended that the splitting up the debt in this way, was a fraud upon the law, and that as the notes were all due and payable and constituted but one debt, the justice of the peace had not jurisdiction.

The words of the Act of 1 March, 1823, giving jurisdiction to the justice are, "where the real debt and damages do not exceed the sum of fifty dollars." Here the real debt exceeds that sum, consequently the justice had not jurisdiction of the case.

Mr. Fendall, cited *Anon.* 1 Vent. 65, and *Girling v. Alders*, 1 Vent. 73; *Clarke v. Andrews*, 1 Shower, 11; *Girling v. Adlas*, 2 Keble, 617; *Thompson v. Shepherd*, 9 Johnson, 262; *Cazenove v. Darrell & Groverman*, in this Court at November term, 1823, [*ante*, 444.]

But the COURT affirmed the judgments. CRANCH, C. J., would have looked further into the cases, but the other judges seeming to be clearly against the appellant, he acquiesced,

NEGROES PETER AND LEWIS v. D. T. CURETON AND A. W. PREUSS.

Children of a female slave born while the mother was in the temporary service of a vendee for years, are slaves of the vendor or vendee. (*Q. & A.* which ?)

BILL IN EQUITY, for an injunction, and for leave to sue for freedom, in *formâ pauperis*.

Negroes Peter and Lewis v. Cureton.

The cause was set for hearing on bill and answer.

The facts of the case appeared to be as follow : Anthony Addison, being the owner of negro Joanna, the mother of the complainants, in the year 1797, sold her to Walter D. Addison for the term of twelve years, without saying any thing of her increase. The bill of sale says, "I sell and deliver the negro Joan to the said Walter as a servant for the term of twelve years;" "to hold the said Joan as a servant," and he warrants the said Joan to the said Walter for that term, "as his right and property." Nothing is said in this bill of sale respecting the condition of Joan after the expiration of the term. Walter D. Addison transferred her to Peter Savarie, in whose family the complainants were born, during the term of service, viz. Peter in 1801, and Lewis in 1803. Savarie died. The defendant Preuss married his daughter and sole heiress, and took out letters of administration upon his estate; and took possession of the complainants as slaves, who continued in his service until he sold them to the defendant Cureton, as slaves for life, at the price of \$640, who confined them in gaol, to be carried to South Carolina.

At the expiration of the twelve years, viz. on the 5th of October, 1809, Anthony Addison executed a deed to manumit the negro Joan immediately, and her children after they should respectively attain the age of thirty-one years. This deed was duly executed, acknowledged, and recorded. The bill, which was accompanied by an affidavit of *Mr. Hewitt*, the complainants' counsel, that he believed the facts, stated in it, to be true, prayed for an injunction to prevent the removal of the complainants from the jurisdiction of this Court, and for leave to sue for their freedom in *formâ pauperis*. The injunction was granted by the Court.

Mr. Hewitt, for the complainants, contended that at the birth of the complainants, their mother was not the slave of Savarie, but of Anthony Addison, and that if they were slaves at all, they also were his slaves, and not the slaves of Savarie, and that he had a right to manumit them.

He also contended that Preuss, by selling them as slaves for life when they had only a few years to serve, had forfeited all right to their services, and that they were now entitled to their freedom. *Ellison v. Woody*, 6 Mun. 368; *Maria v. Surbaugh*, 2 Rand. 230; *Dobson v. Scott*, 1 Har. & M'Henry, 160; *Somerville v. Johnson*, 1 Har. & M'Henry, 348, 352; 1 Cruise, 278; Maryland Law, 1796, c. 67, § 15; Virginia Law of December 25, 1795, (P. P. 346.)

Mr. Peyton and *Mr. Mason*, *contrâ*, contended that Savarie, having the use of the slave Joan for twelve years, her children

Negroes Peter and Lewis v. Cureton.

born during the term became his absolute property as slaves for life. *Scott v. Dobson*, 1 Har. & M'Henry, 160; *Somerville v. Johnson*, 1 Har. & M'Henry, 348, and Dulany's opinion in 352, 357, 559; *Negro Sarah v. Elijah Taylor*, in this Court, November, 1818, [*ante*, 155,] and *Negro Fanny v. Isaac Kell*, in this Court at May term, 1824, (not reported.)

The COURT (THRUSTON, J., *contrà*,) was of opinion that the complainants, being the issue of a slave, were born slaves, either of Savarie, or of Anthony Addison. If of Savarie, they are slaves for life. If of Anthony Addison, they are slaves until they arrive at the age of thirty-one years; and that not being yet entitled to their freedom, their bill must be dismissed.

CRANCH, C. J., was of opinion that they were born the slaves of Savarie.

MORSELL, J., inclined to the opinion that they were the slaves of Anthony Addison, who had a right to manumit them, and that they would be free at the age of thirty-one.

THRUSTON, J., was understood to be of opinion that it was the intention of Anthony Addison, when he sold the negro Joan to W. D. Addison as a servant for twelve years, to manumit her at the expiration of that term, which intention was manifested by his having actually manumitted her. That she was, therefore, not an absolute slave at the time of the birth of the complainants; but was in the condition of a servant, and imparted that condition to them; and that when the mother became free they also became free.

CIRCUIT COURT OF THE UNITED STATES.

MAY TERM, 1825, AT WASHINGTON.

AMBROSE VASSE *v.* CORNELIUS COMEGYSS *et al.*

Unless some party defendant, against whom an effectual decree can be made, be found within the District of Columbia, the Circuit Court of that district, as a Court of Equity, has no jurisdiction of the cause.

Officers of the United States holding the public money, as money of the United States, are only accountable to the United States, and are not liable at the suit of an individual, on account of having such money in their hands.

Where is the treasury of the United States?

BILL IN EQUITY, filed March 12th, 1824.

It states that the complainant, Vasse, in 1802, became bankrupt; and the defendants, Cornelius Comegyss and Andrew Petitt, of Philadelphia, are his assignees; and that Samuel Mifflin, of Philadelphia, is their agent, and the agent of certain underwriters of Philadelphia, of whom the complainant, Vasse, was one; and that Samuel Jaudon, of Washington city, in the District of Columbia, is the agent of Mifflin, to receive certain moneys which have been, or it is expected will be awarded to those underwriters, by the commissioners under the late treaty with Spain, for indemnification for certain spoliation upon the commerce of citizens of the United States by French cruisers, and carried into Spanish ports. These losses happened before the complainant became bankrupt, and he had to pay them in consequence of condemnation as prize in the courts of Spain. The bill states the claims which are made before those commissioners in his name, and for losses which he had sustained, and which had been allowed by the commissioners. It states that the complainant at the time of his bankruptcy gave up property and claims to a greater amount than the amount of his debts; but he never

gave up or assigned his contingent, possible chance of indemnification by the Spanish government for those losses ; nor had he at that time any hope of such indemnification. He states that his assignees had never rendered an account to any person, although they have received large sums. That he may, in a certain event, be entitled to receive out of his estate 5 per cent., but cannot get any account from the assignees, &c. He prays that they may render an account of their trust before the auditor of this Court. That Mifflin and Jaudon may state what amount they claim under the Spanish treaty on the complainant's account, and for whose use they claim it, and that all the defendants may be enjoined from receiving the same, and the treasurer of the United States from paying it, and for general relief.

The injunction, which was granted by one of the judges in vacation, extended only to the defendant Jaudon and his agents, he being the only defendant within the jurisdiction of the Court ; the treasurer, Mr. Tucker, not having been made a defendant, although the bill prayed that he might be enjoined.

Publication having been made against the absent defendants who have not appeared, and the defendant, Jaudon, not having answered, the bill is taken for confessed against all the defendants, and set for decree.

The first question is, Has this Court jurisdiction as to any of the defendants against whom it can make a final decree ? The fund out of which the claims are to be paid, are in the treasury of the United States. Where is that ? The treasurer resides at Washington, and the head of the department ; but is the money there ? Can the fund be said to be within the jurisdiction of the Court ?

We think not. The officers of the United States holding the public money, as the money of the United States, are not accountable to anybody but the United States, and are not liable, at the suit of an individual, on account of having such money in their hands.

The defendants, Comegyss and Petit and Mifflin, against whom only an effectual decree could be made, are not within the jurisdiction of the Court. Jaudon alone is within the jurisdiction, but there is no allegation which will authorize a final decree against him. The allegation that he is the agent of Mifflin, the agent of the assignees, is not a sufficient foundation for a decree against those assignees upon the merits of the case.

We think, therefore, that the bill ought to be dismissed.

MAY 3d, 1825. The COURT (*nem. con.*) ordered the bill to be dismissed.

WILLIAM RHODES v. GEORGE HADFIELD.

In an action by the indorsee of a promissory note, against the maker, upon the plea of limitations, evidence that the note within the last three years before the commencement of the suit, was presented to the defendant, who acknowledged it to be his note, and that it had not been paid, and said the note had been of long standing, and that he should resist payment, but offered terms of compromise which were not accepted, is evidence of such an acknowledgment of the debt as takes it out of the statute.

If the defendant pays part of the money due upon the note, to the widow of the payee, who indorses a receipt therefor on the note, and signs her name as administratrix, and the defendant promises to pay her the residue if time should be given, and she afterwards indorses the note to the plaintiff, no other proof of her right so to indorse the note, is necessary upon the trial, the declaration having averred that letters of administration had been granted to her, and the pleas being *non assumpsit*, and the statute of limitations.

ASSUMPSIT by the indorsee of the defendant's promissory note for \$132, dated November 19, 1814, payable with interest, two years after date, to the order of W. Rhodes, father of the plaintiff.

The present action was commenced on the 4th of September, 1822. The defendant pleaded *non assumpsit* and the statute of limitations. At the bottom of the note was written the following receipt: "February 12, 1821, received \$5 on the above. Mildred Rhodes, Administratrix."

G. Beale, a witness, testified that within the three years, &c., he called upon the defendant with the note and demanded payment. The defendant said he could not pay it; admitted it to be his note, and that it had not been paid, except \$5; said the note was of long standing, and that he should resist the payment; he however offered to settle it in some way, but the witness refused to compromise.

Mr. Beale and Mr. Worthington, for the plaintiff, contended that the evidence so given, if believed by the jury, was sufficient evidence of such an acknowledgment of the debt as took the case out of the statute of limitations.

Mr. Wallach, for the defendant, cited the case of *Ash v. Hayman*, in this Court, at April term, 1824, [*ante*, 452,] and *Clementson v. Williams*, 8 Cranch, 72.

The COURT (CRANCH, C. J., *contra*,) was of opinion, that this was such an acknowledgment of the debt as takes it out of the statute.

The note was made payable to W. Rhodes, the father of the plaintiff, who died. His widow presented the note in 1821 to the defendant, who paid five dollars, and promised to pay the residue, if time should be given. The payment of the five dollars was indorsed on the note as being paid to her as administratrix, and

United States v. Rose.

she indorsed it as administratrix to the plaintiff. There was no other evidence of her being administratrix.

Mr. Worthington, for the plaintiff, contended, and

The COURT (CRANCH, C. J., doubting,) decided, that no other evidence was necessary to prove her right to indorse the note.

Verdict for the plaintiff.

UNITED STATES, for the use of Eliza Balch & others, v. JOHN ROSE.

An executor, indebted to his testator's estate, cannot, in an action upon his administration-bond, brought by creditors or legatees, discharge himself by showing payments to his coexecutors.

If, after the jury is sworn and impanelled, it appears to be a case in which it is necessary to examine and determine upon accounts between the parties, the Court will order the jury to be discharged, and the accounts to be audited and stated by the auditor of the Court, agreeably to the Maryland Act of 1785, c. 80, § 12, and that he report to the Court.

DEBT upon an administration-bond, given by the defendant and the Rev. S. B. Balch, as coexecutors of T. B. Beall. The breach assigned was in not accounting for, and paying over to the persons entitled to the same, a debt of \$4120, due by the defendant to his testator.

In order to show that the whole sum of \$4120 was not due by the defendant, he offered in evidence certificates of his coexecutor, S. B. Balch, that "the defendant is justly entitled to the following credits in his account with T. B. Beall, deceased," &c.

Mr. Jones, for the plaintiffs, objected that those certificates are not competent evidence. One executor is not to account with his coexecutor, and cannot discharge himself from the claims of creditors and distributees, by showing that he has paid the money to his coexecutor.

The COURT (MORSELL, J., not sitting,) rejected the evidence.

Mr. Marbury and *Mr. Swann*, for the defendant.

NOTE. After the jury was sworn, and the cause had been opened, the COURT (*nem. con.*) made the following order:—

"In this case, the Court being of opinion that this is an action in which it is necessary to examine and determine on accounts between the parties, it is ordered that the jury sworn in this cause be discharged, and that the accounts and dealings between the parties be audited and stated by Joseph Forrest, the auditor of this Court, agreeably to the 12th section of the Act of November, 1785, c. 80, and that he report to this Court."

Mickum v. Paul; Mickum v. Edds.

The plaintiffs had leave to amend their replication, by stating the names of the legatees, &c., and the defendant to amend his rejoinder.

S. MICKUM v. CH. PAUL, and S. MICKUM v. JOHN EDDS.

A justice of the peace has jurisdiction in a case of a small debt, and his judgment is not absolutely void; and the officer who serves a *ca. sa.* upon that judgment is not a trespasser: although the plaintiff's proper remedy was upon the defendant's administration-bond, the penalty of which was \$500, and so beyond the jurisdiction of the justices.

TRESPASS and false imprisonment.

William Mickum was a constable, and S. Mickum was his surety in his official bond. W. Mickum, the constable, had received money for Charles Paul, and had failed to pay it over. Paul, supposing S. Mickum to be liable to him for the money received by William Mickum, the constable, brought suit in his own name against S. Mickum, before a justice of the peace. S. Mickum appeared before the justice and denied his jurisdiction, contending that if liable for the money received by William Mickum, it was only upon the bond, the penalty of which was \$500, and upon which no suit could be brought before the justice. But the justice overruled the objection to his jurisdiction, and rendered judgment against S. Mickum for \$2.50, upon which Paul issued a *ca. sa.* which was served by Edds, who was a constable, and who arrested and imprisoned the defendant, S. Mickum; for which arrest and imprisonment, this action of trespass is now brought.

Mr. J. Dunlop, for the plaintiff, contended that the justice had no jurisdiction in the case; and that, therefore, both the constable who served, and the party who procured the *ca. sa.* were guilty of trespass and false imprisonment. S. Mickum could be made liable only by a suit upon the bond, of which the justice clearly had no jurisdiction.

Mr. C. Cox, for the defendant Edds, the constable, prayed the Court to instruct the jury, that the constable was justified by the *ca. sa.* The suit before the justice was not upon the bond, for then the suit would have been in the name of the United States, the obligee. But it was a simple action of debt by Charles Paul against S. Mickum. The justice might have been mistaken as to the liability of S. Mickum for the money received by William Mickum; but that was only an error of judgment, upon which the defendant might have appealed, if the judgment had been for more than five dollars. So, if the justice admitted improper evi-

dence, it would be matter for appeal, but would not deprive him of jurisdiction.

Mr. J. Dunlop, contra. The averment in the warrant, that it was for debt, within the jurisdiction of the justice, did not give him jurisdiction. The question depends upon the nature of the case; as if, upon a warrant for debt, he should give judgment for a trespass. *Yeates v. Lansing*, 5 Johns. 282; Esp. N. P. 195, Amer. ed.; *Ritchie v. Stone*, in this Court, at October term, 1821, (*ante*, 258,) and *Wells v. Hubbard*, at April term, 1822, (*ante*, 292,); *Brown v. Compton*, 8 T. R. 424; 1 Salk. 273, pl. 5; *Orby v. Hales*, 1 Ld. Raym. 3; *Crump v. Halford*, 4 Mod. 353; *The case of the Marshalsea*, 10 Co. 76, (a); *Nichols v. Walker*, Cro. Car. 395; *Hill v. Bateman & al.* 1 Str. 710; *Shergold v. Holloway*, 2 Str. 1002; *Smith v. Bouchier & al.* 2 Str. 993; *Perkin v. Proctor*, 2 Wils. 385.

Mr. R. P. Dunlop, in reply, cited Selw. N. P. 923, and the case of *Shergold v. Holloway*, 2 Str. 1002.

The COURT (*nem. con.*) was of opinion that inasmuch as the warrant in this case was for a debt under five dollars, and the justice professed to act in a case of debt within his jurisdiction, his having received the bond in evidence did not deprive him of jurisdiction in the case. Paul claimed of S. Mickum two and one half dollars as a debt; for this the justice issued his warrant. The question, whether Mickum was indebted to Paul in that sum, was a question within the jurisdiction of the justice. It might have been supported by proper evidence; and the admission of improper evidence could only be ground of reversal upon appeal, if an appeal were given, but did not oust the justice of his jurisdiction.

ONEALE v. BEALL.

In an action by the payee of a promissory note, the plaintiff has a right, at the trial, before offering the note in evidence, to strike out the names of the indorsers.

ASSUMPSIT, by the payee against the maker of a promissory note.

The note, when produced, had the name of the plaintiff and T. Cookendaffer indorsed in blank. The plaintiff, after the jury was sworn, struck out those names, before he offered the note in evidence.

Mr. Frost, for the defendant, objected that the indorsements were evidence that the note had been negotiated and passed away, and that the plaintiff must show that he had taken it up

Bank of Columbia v. King's Administrator.

and had paid it, and that his right of action was reintegrated; and cited *Welsh v. Lindo*, 7 Cranch, 159.

Mr. Ashton, contra, 2 Phil. Ev. 11, note c, and the cases there cited, viz. *Dugan et al. v. United States*, 3 Wheat. 172; *Clark v. Pigot*, Salk. 126, pl. 4.

Verdict for the plaintiff, subject to the opinion of the Court as to this objection.

The COURT (*nem. con.*) after consideration, was of opinion that the plaintiff had a right to strike out the names of the indorsers, and overruled the objection.

Judgment for the plaintiff.

BANK OF COLUMBIA v. GEORGE KING'S ADMINISTRATOR.

If the indorser of a note payable on the 8th–11th of October, die intestate on the 9th, notice of non-payment left with his son at the counting-house of the deceased, on the 11th, is sufficient.

If the note become payable on the 15th–18th of October, a like notice left on the 18th is sufficient, no administration having been granted before that day.

But if the note become payable on the 22d–25th of October, a like notice left at the same place on the 25th is not sufficient, the administrator having a separate place of business in another part of the town.

ASSUMPSIT, against the administrator of the indorser of several promissory notes, made by Wharton & Grindage.

One of the notes became payable on the 11th of October, 1821, for \$2,565; that being the last day of grace. George King, the defendant's intestate, died on the 9th and was buried on the 11th, on which day notice of non-payment was left with a son of George King in the counting-house occupied by him as his place of business up to the day of his death. This was a warehouse in the lower story of the dwelling-house in which George King died, and in which his family continued to reside. The son, with whom the notice was left, was of full age, and had sometimes transacted business for his father in that warehouse.

The COURT (*nem. con.*) said the notice was sufficient.

Another note became payable on the 15th–18th of October, 1821, for \$1,026. A like notice was left in like manner at the same place, on the 18th and 19th of October. Administration was granted to the defendant on the 18th.

Mr. Marbury, objected that this notice was not sufficient to charge the defendant, and cited the case of *The Bank of Washington v. Reynolds*, in this Court at April term, 1822, [*ante*, 289.]

But the COURT overruled the objection.

A third note became payable on the 22d–25th of October, 1821,

 Lewis v. Smith.

for \$950. The administrator kept a counting-house, in which he transacted the business of the estate, at another part of the town; but the notice was left in the same manner as the other notices.

The COURT (*nem. con.*) said it was not sufficient notice to charge the defendant.

Mr. Marbury again contended, in regard to the note due 15th-18th October, that as a notice on the 19th, (the day after the last day of grace,) would not have been too late, and as administration had been granted on the 18th, notice should have been given to the administrator on the 19th.

But the COURT (*nem. con.*) said that the plaintiffs, having done all that they were bound to do on the 18th of October, (the last day of grace,) were not bound to give a notice to the administrator on the 19th.



JOSEPH LEWIS v. RICHARD SMITH, Garnishee of Nimrod Farrow.

If money be deposited in a bank, the cashier is not liable as garnishee of the depositor. If the garnishee is not the debtor of the defendant, he is not liable to judgment of condemnation.

If the defendant himself could not recover against the garnishee, the plaintiff cannot.

ATTACHMENT, under the Maryland Act of 1795, c. 56, and laid in the hands of Richard Smith, cashier of the office of the Bank of the United States at Washington, who was summoned as garnishee.

An Act of Congress for the relief of Nimrod Farrow and Richard Harris, passed on the 3d of March, 1825, c. 84, [6 Stat. at Large, 331,] appropriated \$73,747.78 to be paid to Nimrod Farrow, a contractor for erecting a fort on Dauphin Island, provided that before he should receive it he should give bond to the Secretary of War in the penal sum of \$120,000, conditioned to appropriate the money towards the payment of the debts contracted by Farrow & Harris, or either of them, for supplies furnished, and services rendered in the erection of the fort; and to pay to Harris half of the surplus, if there should be any.

The bond was given, the money received, and \$21,500 of it deposited in the office of the Bank of the United States at Washington, of which the garnishee Richard Smith was the cashier, who gave Farrow two certificates; one purporting that Nimrod Farrow had credit in the office of the Bank of the United States at Washington, for \$15,000, subject to his checks; and the other that N. F. had left with him \$6,500, as a special deposit in lieu

of special bail, to be released on his giving bail to the satisfaction of the marshal.

This appeared upon the answers of the cashier to the interrogatories filed.

Mr. Jones, for the garnishee, objected to judgment against him.

1st. Because he had nothing in his hands, and was not indebted to *Farrow*, the defendant; and

2d. Because, if the Bank of the United States had been legally summoned as garnishee, they never held the money as the general property of *N. Farrow*. He was only a statutory trustee to apply the money to certain purposes mentioned in the act.

Mr. R. P. Dunlop and *Mr. Key*, for the plaintiff.

Of the \$6,500, *Mr. Smith* was the special bailee. The sum of \$5,500, was drawn out by *Farrow* before service of the attachment, but \$1000 of that special deposit remained in *Mr. Smith's* hands at the time of the service of the attachment, and was afterwards drawn out by *Mr. Farrow*. It is sufficient if we show property of the defendant in the hands of the garnishee, in his possession, or under his care.

After *Mr. Farrow* had given bond to apply the money according to the act, it became absolutely his property.

The Bank of the United States could not be a garnishee, because it could not be held to bail under the 6th section of the Act of 1795.

May 17, 1825. *CRANCH, C. J.*, delivered the opinion of the Court, (*THRUSTON, J.*, *contra*.)

The return of the marshal, upon the writ of attachment, is "attached credits in the hands of *Richard Smith*, cashier of the Branch Bank of the United States at the city of Washington, and summoned him as garnishee, on the 30th of April, 1825."

The plaintiff has filed interrogatories which *Mr. Smith* has answered; and the question is whether *Mr. Smith* had in his hands, at the time of the attachment, or since, any credits of *Mr. Farrow*; or, in other words, whether he was, at the time of the attachment or since, the debtor of *Mr. Farrow*. *Mr. Lewis*, claiming in the right of *Mr. Farrow*, cannot be in a better situation than *Mr. Farrow* himself.

It appears, by the answers of *Mr. Smith*, that \$21,500 "were deposited, or left in the office of the Bank of the United States in Washington; of which \$6,500 were left as a special pledge for the indemnity of the marshal, lieu of special bail." That \$5,500, part of those \$6,500, were released by the marshal, and paid to *Mr. Jones* upon the order of *Mr. Farrow*, on the 23d of April, 1825, seven days before the attachment was served; and that the other \$1000, being the residue of the \$6,500, were re-

Lewis v. Smith.

leased by the marshal, and paid to Turner Ashby, upon the order of Mr. Farrow, on the 3d of May, 1825, three days after the service of the attachment.

Mr. Smith says, that when the \$21,500 were deposited, he gave Mr. Farrow two certificates; one purporting that Nimrod Farrow had credit in the office of the Bank of the United States at Washington for \$15,000, subject to his checks; and the other purporting that Nimrod Farrow had left with him \$6,500, as a special deposit in lieu of special bail, to be released on his giving bail to the satisfaction of the marshal. Was Mr. Smith at any time the debtor of Mr. Farrow? The money was deposited in the Bank of the United States to the credit of Mr. Farrow.

If Mr. Smith had been dismissed from his office of cashier, on the day of the deposit, he could not have taken the money with him, nor drawn it from the bank. The bank was the only debtor of Mr. Farrow. Mr. Smith was never liable to Mr. Farrow for this money. It was not specifically holden by Mr. Smith, but went, at once, into the general cash fund of the bank, and Mr. Farrow had credit for it on the books of the bank. The only doubt I ever had, on this part of the case, was, whether Mr. Smith by the terms of his certificate to Mr. Farrow as to the \$6,500, had not, by using the words "left with me," made himself personally liable. But, taking the whole of his answer together, I think the fair inference is, that the \$6,500 were left with him in his character as cashier, and went into the general cash fund of the bank, and that the bank was answerable to Mr. Farrow for that sum, as well as for the residue of the \$21,500, and that Mr. Smith did not make himself more responsible to Mr. Farrow for the \$6,500, than for the residue.

It is said, however, that Mr. Smith had Mr. Farrow's property in his hands, possession, or charge, or under his care, and therefore according to the expressions of the Act of Maryland, (1795, c. 56, § 5, 6,) is liable to have that property condemned in his hands.

It might be a sufficient answer to this suggestion, to say, that the marshal has not attached any property of Mr. Farrow in the hands, possession, or charge, or under the care of Mr. Smith. He attached nothing but credits; and if Mr. Smith was not the debtor of Mr. Farrow, Mr. Farrow was not the creditor of Mr. Smith, and consequently had no credits in his hands.

The clause of the Act of Maryland, (1715, c. 40,) which authorizes the attachment of credits, is the only clause applicable to the present question. But it does not appear that Mr. Smith ever had the property of Mr. Farrow in his hands, possession, or charge, or under his care. It was the bank that received Mr.

Bank of Columbia v. Cook.

Farrow's money, and took the charge of it. Mr. Smith was the keeper of the money of the bank only, and was liable only to the bank. He was never personally liable to Mr. Farrow.

In this view of the case, we do not think it necessary to say what weight ought to be given to the argument that this was a trust fund, and that Mr. Farrow might be restrained from paying away the money until the class of creditors described in the act for the relief of Nimrod Farrow and Richard Harris, should be satisfied. Nor do we give any opinion as to any equitable right which the creditors (intended to be protected by that act) might have, in any given case, to restrain him from exercising his legal rights, until their claims should be satisfied; nor as to the right of Mr. Lewis to the benefit of this process of attachment, if it had been served on the Bank of the United States.

But, being of opinion that Mr. Smith never was the debtor of Mr. Farrow, we think we must refuse the judgment of condemnation. THRUSTON, J., dissented.

THE BANK OF COLUMBIA v. WILLIAM COOK.

The affidavit of the President of the Bank of Columbia, made under the 14th section of its charter, stating that "the note was not paid when due, according to the best of his knowledge and belief," and that the sum of "remained due upon the note," is sufficiently certain, although he does not state that it remained due from the defendant, nor that the defendant is the person who signed the note.

Upon the return of an execution issued by order of the President of the Bank of Columbia, under the 14th section of its charter, the Court will not quash the execution because it appears on the face of the note, upon which it was issued, that it had been due more than three years before the issuing of the execution.

The Court will permit the defendant, upon the return of the execution issued by the President of the Bank of Columbia, to plead the statute of limitations.

UPON the return of an execution, issued by order of the president of the Bank of Columbia, under the 14th section of its charter, (Act of Maryland, 1793, c. 30, § 14,)

Mr. Worthington, for the defendant, moved the Court to quash the execution; 1st, because the affidavit of the president was too uncertain; and 2d, because it appears by the face of the note that it is barred by the statute of limitations.

The affidavit stated, that the note "was not paid when due, according to the best of his knowledge and belief;" and that the sum of "remained due on the note," without saying that it was due from the defendant, and without stating that the defendant is the William Cook who signed the note. As the proceeding under the charter is in derogation of common right, it must be strictly pursued, and nothing left uncertain. The

documents sent by the president to the clerk, must show a *primâ facie* debt; but upon the face of the note, it is barred by the act of limitations.

The COURT (*nem. con.*) stopped *Mr. Key*, who was about to reply, and refused to quash the execution; being of opinion that the affidavit of the president of the bank is agreeable to the provisions of its charter; and that the note, notwithstanding its date, (January, 1818, at 60 days,) is *primâ facie* evidence of a debt. If the statute of limitations had been pleaded, the plaintiff might have replied a new promise, or some other bar to the statute. (See *Gould v. Johnson*, 2 *Ld. Raym.* 838, and *Puckle v. Moore*, 1 *Kent*, 191.)

Mr. Worthington, for the defendant, then offered to plead the statute of limitations.

Mr. Key, for the plaintiff, objected that the defendant had no right to plead the statute of limitations to this summary proceeding. The object of the act was to enable the bank to indulge their debtors, without danger of losing their debts by lapse of time. No laches can be imputed to a plaintiff who holds such a power. The note is equivalent to a judgment. The charter only permits defendants to show payments; or that he does not owe the whole of the debt. The defendant can only plead to the merits; and before he can plead the statute of limitations, he must satisfy the Court that it is necessary to the merits. The bank charter, which gives the remedy, does not limit it to any particular time; and this proceeding is not an action within the meaning of the statute of limitations.

Mr. Key urged the case of *Ingle v. Hogan* upon the Court, decided at October term, 1822, (*ante*, 352.)

The COURT (CRANCH, C. J., doubting,) permitted the defendant to plead the statute of limitations.

BANK OF COLUMBIA v. JOHN OTT'S ADMINISTRATOR.

In an action against the indorser of a promissory note, payable sixty days after date, *non assumpsit infra tres annos*, is a bad plea upon general demurrer; it ought to be *actio non accrevit*.

SEE this case at last term, (*ante*, 529.)

Assumpsit against the administrator of the indorser of a promissory note, payable in 60 days after date. The defendant had pleaded "*non assumpsit infra tres annos*," to which the plaintiff demurred generally.

Mr. J. Dunlop, contends that the plea is bad upon general

Ex parte Knowles.

demurrer, because the note, being payable in sixty days after date, the plea ought to have averred that the cause of action did not accrue within three years, whereas it only avers that the defendant did not promise within three years. 2 Saund. 63 c, which cites *Gould v. Johnson*, 2 Salk. 422; 2 Ld. Raym. 838, S. C.; *Puckle v. Moore*, 1 Vent. 191; *Birks v. Trippet*, 1 Saund. 33, note 2; Bull. N. P. 151.

Mr. Marbury, contra. This is an action against the indorser, whose liability did not accrue until after the note became payable; and the declaration avers, that in consideration of that liability the defendant promised to pay. It was not *debitum in presenti, solvendum in futuro*.

Mr. Key, in reply. The plea does not relate to the implied promise which the law raises, and which is averred in the declaration as arising from the facts previously averred. The indorser makes a conditional promise at the time he indorses. The promise relates back to the time of the indorsement. The promise of the maker is stated in the same way, namely, "by reason whereof, and by force of the statute," &c., "the defendant became liable, and being so liable, in consideration thereof promised to pay," &c. The liability of the indorser upon his original undertaking and the plaintiff's right of action, did not accrue until sixty days after the promise; so that the promise may have been beyond the time of limitation, and the right of action within it.

The COURT, after consideration, (THRUSTON, J., *contra*,) was of opinion that the plea of "*non assumpsit infra tres annos*," pleaded by an indorser of a promissory note payable sixty days after date, was bad, upon general demurrer. It ought to have been *actio non accrevit*.

Ex parte HENRY KNOWLES, an Insolvent Debtor.

Upon the trial of an issue upon allegations of fraud against an insolvent debtor, it must appear that the intended fraud was against creditors who were such at the time of the supposed fraudulent conveyance, and at the time of trial.

A *bonâ fide* sale, by the debtor, of his property or any part of it, for the purpose of paying certain preferred creditors, to the exclusion of others, is not a fraud of which he can be convicted upon allegations filed under the insolvent act.

The inserting in the deed, a consideration less than the true consideration paid, is not, of itself a fraud, if a fair, valuable, *bonâ fide* consideration was paid, or contracted to be paid.

A deed, void as to creditors, because not accompanied and followed by possession, although technically fraudulent as to creditors, is not evidence of fraud of which the debtor can be convicted upon allegations under the insolvent act, if there was a real, *bonâ fide* consideration.

Upon the trial of an issue upon allegations under the insolvent act, the burden of proof is on the complaining creditors to show the fraudulent intent.

Upon the trial of an issue upon allegations filed by certain cre-

ditors of Henry Knowles, a petitioning insolvent debtor, under the Act of Congress "for the relief of insolvent debtors within the District of Columbia," [2 Stat. at. Large, 237,] the following instructions to the jury were moved by *Mr. Jones*, for the petitioner, and given by his Honor, Judge MORSELL.

1. That in order to convict the petitioner of the offence charged in the said allegations, it is necessary for the prosecutors to prove that the petitioner had conveyed, lessened, or disposed of the property described in the said allegations to defraud the creditors who were creditors at the time of the said conveyances, and who still continue creditors, or some of them; and if the creditor or creditors, so intended to be defrauded, have since been paid and satisfied, the fraud or deceit then practised or intended against the creditor or creditors so paid and satisfied, cannot be taken advantage of by persons who have since become creditors, to convict the petitioner under these allegations.

2. That a fair and *bonâ fide* sale of the property, for the purpose of applying the money to the payment of certain preferred creditors, to the exclusion of others thought by the petitioner to be less meritorious, is not a fraud or deceit towards his creditors, of which he can be convicted under the said allegations.

3. That the designation in the deeds, of a nominal consideration less than the real one paid, is not, of itself, a fraud, if a fair, valuable, and *bonâ fide* consideration were in fact paid, or *bonâ fide* contracted to be paid, and the purchaser absolutely bound for the payment.

4. That the circumstance of the bargainor's remaining in possession of the property (if he should be found, in fact, to have remained in possession of it) notwithstanding a conveyance absolute in form, so as to make the conveyance void, and technically fraudulent, as against creditors, is not, of itself, any fraud or deceit of which the petitioner can be convicted under the said allegations, if there was a real, fair, and *bonâ fide* consideration.

5. That the burden of proof is on the prosecutors to show that the conveyances set forth in the allegations were fraudulent, as averred in the allegations; and that the said conveyances are to be presumed to be fair and *bonâ fide* and for valuable consideration until the prosecutors show that they are fraudulent, or for a consideration grossly inadequate, or reduced below its proper and fair amount, with a fraudulent intent towards his creditors.

MAGRUDER'S TRUSTEE v. BOWIE & KURTZ.

Part-owners of a ship are not joint partners; each may maintain a separate action

Owen & Longstreth v. Glover.

against the ship's husband for his proportion of the freight; and it is no objection that the ship's husband is one of the part-owners.

ASSUMPSIT for one fourth part of the freight earned by the ship Alleghany, of which Magruder owned one fourth, Thomas Peter one eighth, George Peter one eighth, and the defendants one half.

Mr. Marbury, for the defendants, contends that this is a partnership; and that one partner cannot sue another at law. The reasons applicable to general partnerships apply to this case as between these parties.

The COURT (THRUSTON, J., absent,) stopped *Mr. Key* and *Mr. Dunlop*, in reply, and said that part-owners of a ship are not joint partners; each may maintain a separate action, against the ship's husband, for his proportion of the freight; and that it was no objection that the ship's husband was one of the part-owners; as their interests were separate, and not joint.

Verdict for the plaintiff, \$929.58, with interest from 1821.

 OWEN & LONGSTRETH v. CHARLES GLOVER.

A discharge from commitment upon a *ca. sa.* under the Insolvent Act of the District of Columbia, is no discharge of the debt; but the plaintiff may resort to the lien of his judgment upon the lands of his debtor, although sold and conveyed away by him while the plaintiff was pursuing his remedy against the person of his debtor, and although the plaintiff had obtained judgment against him and his sureties upon his prison-bonds bond.

THE plaintiffs recovered two judgments against the defendant, at June term, 1818, for about \$1,600, issued writs of *ca. sa.*, upon which the defendant was taken and committed in execution, and gave prison-bonds bonds, which he forfeited, and upon which the plaintiffs recovered judgment against him and his sureties. After the expiration of one year from the date of the prison-bonds bonds, he was retaken upon the original writs of *ca. sa.* according to the provisions of the Act of Congress of the 24th of June, 1812, § 3, [2 Stat. at Large, 755,] and committed to close custody, from which he was discharged under the Act of the 3d of March, 1803, [2 Stat. at Large, 237,] "for the relief of insolvent debtors within the District of Columbia." The plaintiffs then issued writs of *fi. fa.*, and took in execution the lands of Mr. Glover, which were bound by the judgments in 1818, although Mr. Glover in the mean time had sold and conveyed them to divers persons. These writs of *fi. fa.* were returnable to this term, and now,

Mr. Fleet Smith, *Mr. Lear*, and *Mr. Jones* for the tenants and purchasers, moved the Court to quash the writs;

1. Because they were issued more than a year after the return of the writs of *ca. sa.*, without a *scire facias*.

2. Because Mr. Glover could not be recommitted upon the *ca. sa.* after its return.

3. Because, by the 5th section of the insolvent act, it is enacted that "no process against the real or personal property of the debtor shall have any effect or operation, except process of execution, or attachments in the nature of executions, which shall have been put in the hands of the marshal, antecedent to the application" of the debtor for the benefit of the act.

Mr. J. Dunlop, contra. The judgments bound this land. Mr. Glover sold it and conveyed away all his interest in it before his application for a discharge under the insolvent act, so that it was not his property when he took the insolvent's oath; and never could come into the hands of his trustee as part of his effects. The lien of the judgments is wholly unaffected by his discharge under the act.

Mr. Jones, in reply. The plaintiffs have elected to take a *ca. sa.*, and having taken the body, have abandoned their lien on the lands. The commitment on the *ca. sa.* is satisfaction in law, and the only saving of the debt to the plaintiff is under the insolvent act; and then only *sub modo*. The remedy is pointed out by that act. If it be a lien it can be enforced only in the manner provided for in the fifth section. It does not give a general right to proceed by *fi. fa.* after the insolvency. This *fi. fa.* is against the goods, chattels, and lands of Glover; that is, against the goods, chattels, and lands of Glover, after his insolvency, which these lands are not.

The COURT (THRUSTON, J., absent,) refused to quash the executions, being of opinion that the judgments bound the lands, and have never been satisfied. The lands, having been sold by Mr. Glover, never could come to the hands of his trustee, so as to be liable to distribution under the insolvent act. See *Taylor v. Thompson's Lessee*, 5 Peters, 358, where this decision is affirmed.

ELIZABETH T. ARGUELLES v. WILLIAM WOOD.

If the landlord draws an order on his tenant, on account of rent, and the tenant accepts but does not pay it when due, and suffers himself to be sued for it by the payee, he is not entitled to set it off, under the plea of no rent arrear, in an action of replevin, if the landlord, at the trial of the replevin, produces the order cancelled, and offers to surrender it to the tenant and to pay the costs of the suit brought upon it. If the jury find the amount of the rent arrear in damages, without stating it to be the amount of the rent, the Court will permit the verdict to be so amended by the clerk, after the jury have rendered their verdict and retired from the bar, and even after

Arguelles v. Wood.

another cause has been tried. And upon such a verdict the Court will award a *retorno habendo* : and will not arrest the judgment because the jury have not found the value of the distress taken.

REPLEVIN. Avowry for rent — plea, no rent arrear, and issue.

The defendant had drawn an order on the plaintiff on account of the rent, in favor of R. Smith, for \$87.50, which was accepted by the plaintiff. This was outstanding at the time of the distress, and was not credited.

The amount distrained for was \$175, on the 7th of August, 1823. Suit was brought by Mr. Smith against the plaintiff upon her acceptance in November, 1823. She now claims credit for this sum of \$87.50, against the rent. The defendant produces the acceptance and offers to cancel and surrender it, and to pay the costs of the suit of *Smith v. Arguelles*.

The COURT (MORSELL, J., *contrà*,) was of opinion that the plaintiff could not now receive credit for that acceptance; it being sufficient for the defendant, at this trial, to produce and cancel the acceptance.

MORSELL, J., was of opinion, that if the acceptance was received by Wood as payment of so much of the rent, the plaintiff was now entitled to the credit, as it was not produced and cancelled, or tendered at, or before, the time of the distress. See *Chitty*, 130, note 1, *Phil. Ed.* 1821; *Harris v. Johnson*, 3 Cranch, 311; *Shehee v. Mandeville*, 1 Cranch, 191; *Clark v. Young*, and the other cases cited in the note in *Chitty*, 130.

The jury found their verdict for the defendant; damages, \$140, with interest from the 20th of July, 1824. After the verdict was taken down by the clerk, and before the jury separated, Mr. Ashton, for the defendant, suggested a doubt whether the verdict was correct, but did not then make any specific motion to amend it, and the Court went into another trial, and the jurors in this case retired from the bar, and separated. After the trial of the next cause, Mr. Hall and Mr. Ashton, moved for leave to amend the verdict, by stating that the \$140 was the amount of the rent arrear, and

The COURT (CRANCH, C. J., doubting,) permitted the amendment to be made.

After the amendment was made, stating that the jury found one cent damages for defendant, that the rent arrear was \$140, with interest, &c., Mr. Jones, for the defendant, moved in arrest of judgment, and contended that the verdict was not good at common law, nor under the statute of 17 Car. 2, c. 7, because it has not found the value of the goods distrained; for by the statute the judgment for the defendant must not exceed the value of the distress. 2 Selwyn, N. P. 1144; *Freeman v. Archer*, 2 W. Bl. 763; *Rees v. Morgan*, 3 T. R. 349.

Dix v. Nicholls.

Mr. Ashton, contra. An avowry was a proceeding at common law, and if the verdict is for the defendant, the regular judgment at common law is for a writ *de retorno habendo*. The finding of the amount of the rent arrear, does not injure it as a common-law verdict. It is but surplusage; and we ask only the common law judgment of *retorno habendo*. Hammond, N. P. 493; *Rees v. Morgan*, 3 T. R. 349. The verdict cannot now be amended so as to justify the statute judgment, but we are entitled to judgment at common law.

The COURT (*nem. con.*) ordered judgment to be entered for the writ *de retorno habendo*.

JOHN DIX v. HEZEKIAH NICHOLLS.

An attachment under the Act of Maryland, 1795, c. 56, will not lie for a debt under the value of twenty dollars.

The proceeding must be according to the directions of the Act of Maryland, 1791, c. 68, § 1.

This was an attachment issued by the clerk of this Court upon a warrant of a justice of the peace directed to the clerk, under the Act of Maryland, 1795, c. 56, upon a debt of \$8.87.

Mr. Morfit, for the plaintiff, moved for judgment against the garnishee upon his default of appearance.

Mr. Wallach, as *amicus curiæ*, suggested that the case, being for a debt under \$20, was not within the jurisdiction of this Court, unless the plaintiff should proceed according to the directions of the Maryland Act of 1791, c. 68, § 1, by which it is provided that "if the justice's warrant shall be returned *non est inventus*, the creditor may proceed in the respective county courts, for obtaining an attachment according to the directions of the Act for issuing out attachments in this Province, and limiting the extent of them," (1715, c. 40,) "against the goods, chattels, and credits of such person for any sum exceeding ten shillings, or fifty lbs. of tobacco."

Mr. Morfit, in reply, insisted that his remedy was strictly within the letter of the Act of 1795, which makes no exception of cases under \$20. That although a warrant from the justice against the defendant had been returned *non est*, it did not prevent the plaintiff from proceeding under the Act of 1795. That the return of *non est* gave this Court jurisdiction of the case; and the Act of 1795 is only a supplement to that of 1715, c. 40.

The COURT (THRUSTON, J. absent,) was of opinion that this Court could not take jurisdiction of this case in any other way

than that which is pointed out by the Act of 1791, c. 68. The Act of 1795, does not purport to give the Court jurisdiction in cases of less value than £100, and we think it did not intend to give it. That Act must, as we think, be restricted to cases not before excluded from the jurisdiction of the county courts by the smallness of their value. The justice of the peace, therefore, in this case, had no right to command the clerk of this Court to issue this attachment, nor was the clerk bound to issue it upon his command. The attachment, not being legally issued, cannot give this Court jurisdiction. The creditor ought to have proceeded according to the Act of 1715, and not according to the Act of 1795.

NICHOLLS *et al.* v. HODGE'S EXECUTOR.

The creditors of the insolvent estate of a deceased debtor have a right to contest the settlement of the executor's account before the Orphans' Court, and to appeal from its decision to this Court.

The amount of compensation to be allowed to the executor for his services in settling the estate within the limits of five and ten per cent. on the inventory, is a matter within the exclusive cognizance of the judge of the Orphans' Court, and while his order upon that subject remains unrepealed, it is conclusive against the creditors, and could not be controverted upon *plene administravit*.

A claim by the executor, as a creditor of the estate, cannot be controverted by the other creditors before the Orphans' Court. That Court has no definitive jurisdiction between contending creditors.

THIS was an appeal from the Orphans' Court.

Nicholls and others, creditors of Thomas C. Hodges, deceased, filed a petition to the judge of the Orphans' Court of this county on the 24th of September, 1823, stating that the estate of the deceased is insolvent; that the allowance, made by the judge to the executor, on settlement of his account of administration on the 26th of October, 1822, of a commission of ten per cent. on the amount of debts paid (\$21,765.83) equal to \$2,176.58, is more than a just compensation for his services in settling the estate, and praying a rehearing, as they had no notice of his application for such an allowance.

They state that he had very little trouble.

On the 23d of January, 1824, the petitioners amended their petition, and prayed for a rehearing as to an item of \$900, allowed by the judge to the executor for his personal claim as a creditor of the estate for services rendered as clerk to the testator in his lifetime.

To this petition the executor filed his answer on the 26th of January, 1824, denying that he had little trouble, and claiming

credit for the promptness and fidelity with which he had executed his trust, and insisting that his claim for services to the testator in his lifetime, was fair, legal, and equitable.

To this answer a general replication was filed, and evidence taken as to the trouble and labor required to settle the estate; and as to the executor's claim against the estate for services to the testator in his lifetime, as his clerk.

Upon the rehearing, the Orphans' Court affirmed its first judgment, and the creditors have appealed to this Court.

The cause was argued on the 27th of May, 1825, by *Mr. Key*, for the appellant, and *Mr. R. S. Cox*, for the appellee.

June 1st, 1825. CRANCH, C. J., delivered the following opinion, (THRUSTON, J., concurring in the result of it, but MORSELL, J., dissenting.)

The first question which occurred to me upon the opening of this cause was, whether the Orphans' Court had jurisdiction between the executor and the creditors; and whether the creditors had any right to intervene in the cause and pray a rehearing of an order made upon the settlement of the executor's account. They were no parties to that settlement, and are not bound thereby. *Beatty v. State of Maryland*, 7 Cranch, 281. But upon further consideration I am inclined to think that my first impression was wrong. I think the order of the judge fixing the amount of the compensation of the executor for his administration of the estate, so long as it remains unrepealed, is conclusive in favor of the executor and against the creditors, because it is a matter within the exclusive cognizance of the judge, and left to his discretion by the very words of the statute; and his order, allowing it, could not be controverted upon the plea of *plene administravit*. The other items of the account, not depending upon the discretion of the judge, are not conclusive upon the creditors. As to the item of commissions, the creditors were therefore interested, and had a right to ask for a rehearing; and had a right to appeal from a decision against them on that point. But as to the other items, viz. the \$900, claimed by the executor as a creditor of the estate, it is a mere contest between contending creditors, of which the Orphans' Court has no jurisdiction. It can decide nothing definitively between them. The whole question is open upon *plene administravit*. The allowance of that item is no *gravamen* of which the petitioners can complain. Their rights are not, in any manner affected thereby, and they have no right to intervene. I shall therefore dismiss that item, with the remark, that it is no ground for reversing the decree or sentence of the Orphans' Court.

But the question of commission, at the rate of 10 per cent., is

still before us. It was a question left entirely to the discretion of the judge. But when a statute gives a discretion to a judge, it means a sound and legal discretion; not whim, or caprice, or fancy. And if an appeal be given, the same discretion is transferred to the appellate court, who are, under all the circumstances of the case, to decide whether the court below has exercised its discretion soundly. By the civil law, and especially, by the canon law, a remnant of which lurks in the Orphans' Court, an appeal transfers the whole cause to the appellate Court, where the appellant may "*non allegata allegare, et non probata probare.*" Clerk's Praxis, tit. 54, 60. The question, therefore, is now before us, whether the judge below exercised his discretion soundly and legally, in allowing the executor a commission of 10 per cent. upon the amount of the inventory, excluding what was lost upon the sales.

The insolvency of the estate cannot affect the present question; for, if the estate were solvent, the allowance of the commission would be as much in derogation of the rights of the distributees as it is now of those of the creditors. The answer of the executor, which, in this respect, is responsive to the petition, and is, therefore, evidence in his favor, says that he had many months of trouble and labor, attended with a great deal of expense, and a necessary abandonment of his own private concerns, in bringing the business to a close; and that, upon the present state of the account of his administration, there is a large balance due to him. Mr. Isaac S. Nicholls, with whom the executor boarded, also testified that he seemed to have a great deal of trouble in the settlement of the business. It also appeared in evidence, that the testator had bequeathed to the executor a considerable legacy, which failed of effect, in consequence of the insolvency of the estate. It appeared, also, that the principal part of the estate consisted of a shop of goods, which the executor employed an auctioneer to sell; and having received notes from the purchasers, he paid them over to the creditors in discharge of the debts due from the estate. By the old testamentary system of Maryland, a commission of 10 per cent. upon the amount of debts paid, was allowed, in all cases, and an additional 5 per cent. in cases of extraordinary trouble; and 10 per cent. was the customary commission allowed to the factors of foreign merchants for collecting the debts due to their constituents.

Taking into consideration all these circumstances, and that the Orphans' Court, who superintended the settlement of the estate, had the best means of judging of the merits of the executor, who was the nephew of the testator, and the intended object of his bounty, I am of opinion that the judge exercised his discretion

soundly and legally, and that the decree ought to be affirmed, with costs.

THRUSTON, J., concurred in this decision, upon the ground that this Court had no right to control the discretion of the judge of the Orphans' Court.

MORSELL, J., dissented, because he thought the discretion of the judge had not been exercised soundly, and because he ought not to have allowed the executor to retain the \$900 for his claim against the estate.

The Supreme Court (4 Peters, 563,) affirmed the sentence of the Orphans' Court, as to the commissions, but reversed it as to the \$900.

WINTER *et al.* v. SIMONTON.

The authority of a justice of the peace, in one of the States, may be proved by parol. An affidavit of the plaintiff's, (written upon the back of a copy of the charter-party, and annexed to an account current which states the particular charge, with dates, &c., and averring that "there is now due, and unpaid, upon the original charter-party, of which the within is a true copy, \$2,433.06, the whole amount of said charter being \$3,212.96, of which \$779.90 have been paid, agreeably to the account current by us signed and hereunto annexed, which exhibits the true and perfect state of the demand now existing between the said Simonton and ourselves,") is sufficiently certain to hold the defendant to bail, in an action of covenant on the charter-party. The marshal is bound to take sufficient bail for the appearance of the defendant, in all cases, except in the actions of trespass on the case mentioned in the 3d section of the Maryland Act of 1715, c. 46, and he is the judge of its sufficiency.

That act does not include actions of covenant.

The marshal, being called upon by the Court to bring before them any defendant arrested by him upon any original writ or mesne process, according to the tenure of his return, and failing so to do, will, on motion, be amerced to the amount of the debt, or damages and costs, and judgment will be entered therefor, *nisi*, the second day of the next term.

COVENANT on a charter-party.

Upon the return of the *capias ad respondendum*, Mr. Key moved that the defendant might be permitted to appear without special bail.

The affidavit was made in the State of Maine, before Eben Clapp, who calls himself a justice of the peace. Another person, who calls himself a notary-public and justice of the peace for the county of Lincoln, certified that the said Eben Clapp was a justice of the peace for the same county; but his certificate is dated one month before the date of the affidavit taken before Mr. Clapp.

Mr. Key, for the defendant, objected that there was no evidence of the authority of the justice to administer the oath, and cited the case of *Smith et al. v. Watson*, in this Court, at June

term, 1806. (1 Cranch, C. C. 311;) 3 Wharton's Dig. 50, tit. Bail; and *Turner v. Fendall*, 1 Cranch, 117.

Before the Court decided upon this objection to the affidavit, the plaintiff produced a witness, (Geo. Sullivan, Esq.,) who proved the handwriting of the justice, and that he was acting as a justice of the peace, at Bath, in the county of Lincoln, in the State of Maine, where the affidavit was made.

Mr. Key then objected, that the affidavit was not sufficiently certain. It was written upon the back of a copy of the charter-party, upon which the suit was brought, and which was annexed to the plaintiff's account current with the defendant. It was made by the plaintiffs, and stated "that there is now due and unpaid upon the original charter-party, of which the within is a true copy, twenty-four hundred and thirty-three dollars and six cents; the whole amount of said charter being thirty-two hundred and twelve dollars and ninety-six cents, of which seven hundred and seventy-nine dollars and ninety cents have been paid, agreeably to the account current by us signed and hereunto annexed, which exhibits the true and perfect state of the demand now existing between the said Simonton and ourselves," "and that the foregoing account current is just and true in all particulars."

The affidavit ought to be as positive and direct as that required by the statute of 12 Geo. 1, c. 29.

But it is not positive. It says, "agreeably to the account current hereunto annexed." The account shows that the balance is carried to a new account which is not produced. It avers that the account exhibits the true state of the "demand" between them and the defendant, not the amount due. It does not state that any thing is due from the defendant, nor from anybody else, to the plaintiffs. *Travers v. Hight*, in this Court, at June term, 1812, [*ante*, 41;] *Young v. Moriaty*, at the same term, [*ante*, 42;] *Bartleman v. Smarr*, at December term, 1810, [*ante*, 16;] *Welch v. Hill*, 2 Johns. 100.

The COURT (MORSELL, J., doubting whether the affidavit was sufficiently certain,) overruled the objections to the affidavit, and ruled the defendant to give special bail.

On a subsequent day, (May 26th,)

Mr. Burrell, for the plaintiffs, moved the Court to amerce the marshal, to the amount of the damages and costs, for not bringing in the defendant when called upon by the Court, at the return of the *capias*.

The damages, at the time of the arrest of the defendant, were not stated in, or upon, the writ; no declaration had been sent with the writ, and no affidavit filed to hold the defendant to special bail; but while the defendant was in custody of the mar-

shal, upon this writ, Mr. Barrell, the plaintiff's attorney, made this indorsement upon it: "Covenant on charter-party; damages, 4,000 dollars." The charter-party was not filed, but was produced by the plaintiff's attorney while the marshal had the defendant in custody, upon this writ, before one of the judges upon *habeas corpus*, and was shown to the marshal, to the judge, and to the defendant, who made no objection to it. The covenant was to pay \$425 per month, to commence on the 7th of July, and to pay \$600 on the arrival of the vessel at Havana. The judge ruled the defendant to give special bail; or rather, refused to discharge the defendant without special bail.

Mr. Barrell contended that the Maryland Act of 1715, c. 46, § 3, applies only to actions of trespass on the case, where the damages are uncertain; and that in all other cases the marshal is bound to take full bail; and if he does not produce the body of the defendant, at the return of the writ, the Court, upon motion, is bound, by the Maryland Act of 1794, c. 54, § 2, to amerce him in the whole amount of the debt or damages, and costs.

Mr. Key, contrà.

The marshal can be amerced only \$133 $\frac{1}{3}$, or 8,000 pounds of tobacco, according to law, and the practice of this Court, under the Act of Maryland of 1715, c. 46. The statute of 12 Geo. 1, c. 29, never was extended to Maryland, and the practice in that state, before that statute, and before the Act of 1715 was settled, that the defendant might be held to bail, in all actions, without affidavit, and the sheriff was to take a bail-bond in 8,000 pounds of tobacco. The statute of 1715 speaks only of actions on the case; but the same practice previously prevailed in all actions. Actions of covenant are within the mischief of the Act of 1715; which Act recognizes the previous practice, and limits the amount of bail. *Gorsuch v. Holmes*, 4 Har. & McH. 5; (Judge Samuel Chase's opinion;) *Anonymous*, 4 Har. & McH. 159.

By the English statute of 23 H. 6, c. 10, the sheriff was obliged to take a bail-bond in a reasonable amount, of which the sheriff was to judge. If he took a bail-bond, he was justified; if he did not, he was liable to an action for escape. The practice in Maryland, where there was no special order, before 1715, was to take a bail-bond for 8000 pounds of tobacco. If the damages were not mentioned in the writ, and if no declaration was sent with the writ, in what amount was the marshal to take bail? How could he be safe against both plaintiff and defendant? In this case, the marshal took a bail-bond in \$1,000, and has tendered it to the plaintiff's attorney, who refused to accept it.

Mr. Barrell, in reply, observed that the case cited from 4 Har. & McH. 159, was not upon a question of amercement, but upon

a question of ruling bail. That if the marshal required excessive bail, the remedy of the party was by *habeas corpus*.

He relied upon the positive requisition of the Act of Maryland of 1794, c. 54, § 2, which gives the plaintiffs a right to judgment against the marshal for their whole amount of damages and costs, for not producing the body of the defendant upon the return of the writ.

June 4, 1825. CRANCH, C. J., delivered the opinion of the Court.

This is a motion to amerce the marshal to the full amount of damages and costs, for not bringing in the body of the defendant, according to the tenor of his return upon the *capias ad respondendum*.

The action is for covenant broken, brought upon a charter-party, by which the defendant covenanted to pay to the plaintiffs \$425 a month for the use of a vessel. At the time of the arrest of the defendant, no declaration was filed, nor any affidavit of debt, nor even an indorsement on the writ of the amount claimed; nor did the amount of damages claimed by the plaintiffs appear in the writ. The marshal took a bail-bond, in the penalty of \$4,000, which he offered to assign to the plaintiffs before this motion was made.

By the law of Maryland, 1794, c. 54, § 2, it is enacted, "that where any sheriff or coroner, being called upon, by order of the General Court, or any county court, to bring before them any defendant or defendants before arrested by such sheriff or coroner, upon any original writ or *mesne process*, according to the tenor of his return, the court, on motion, shall cause such sheriff or coroner to be amerced to the amount of the debt or damages, and costs due from the defendant or defendants, to be ascertained by the oath of the plaintiff or plaintiffs, his, her, or their agent, factor, or attorney, and such other proof as the court may require, and shall and may enter judgment *nisi*, the second day of the next term thereafter, for the amount of the amercement aforesaid, in the name of the plaintiff or plaintiffs, and for his or their use, against such sheriff or coroner, which judgment shall be as valid and effectual as any judgment rendered upon any verdict of a jury."

This act is peremptory, that the court shall cause the sheriff to be amerced to the amount of damages and costs.

But it is contended, on the part of the marshal, that the Act of Maryland, 1715, c. 46, § 3, ought to be extended to actions of covenant, because they are within the same mischief.

By that section it is enacted, "that in all actions of trespass on the case, where damages are laid to be above 4,000 pounds of

tobacco, if no declaration be sent with the writ expressing the true cause of action, the sheriff shall not require a bail-bond exceeding the sum of 8000 pounds of tobacco, although the damages be marked on the writ for any greater sum whatsoever."

By the English statute of 23 H. 6, c. 10, sheriffs and all their ministers may deliver to bail or main-prize, upon sufficient surety, all persons arrested by writ, bill, or warrant in any personal action. Of the sufficiency of that surety, the sheriff was the judge.

By the statute of 13 Car. 2, 2, the bail for appearance shall not be bound in a penalty above £40, if the cause of action be not particularly expressed. Before that statute it might be in any sum the sheriff pleased. Day's Com. Dig. Bail, 30, K. 4.

But it appears by the cases cited by the counsel of the marshal, from 4 Harris & M'Henry's Rep. 5 and 159, that neither the statute of 13 Car. 2, 2, nor that of 12 Geo. 1, 23, nor the subsequent statutes of George, were ever considered in force, or practised upon in Maryland.

The present question, therefore, depends upon the statute of 23 H. 6, c. 10, and the Maryland Acts of 1715, c. 46, § 3, and 1794, c. 54, § 2.

By the statute of 23 H. 6, c. 10, if the sheriff return a *cepi corpus*, or *reddidit se*, he shall have his prisoner at the return day, as before the act. And if he has not, he shall be amerced by the Court, upon a rule given to bring in the body. Compl. Att'y, 311; *Etheric v. Cowper*, 1 Salk. 99; Com. Dig. Bail, K. 5.

The first amercement was only 40s., but issues were from time to time subsequently increased, until they amounted to the debt or damages, and costs claimed by the plaintiff.

This practice under the statute prevailed in Maryland before the year 1794, when the act was passed, making the amercement a direct remedy for the plaintiff, and authorizing the Court to amerce the sheriff to the full amount of debt or damages and costs, in the first instance.

We are not informed of any case in Maryland, in which it has been decided that the statute of 1715, c. 46, § 3, comprehends actions of covenant, as well as actions of trespass on the case. The preamble of that section shows that the evil intended to be remedied, was the holding to bail in spiteful and malicious actions of trespass on the case, in which the plaintiffs laid their damages very high. The same cause of complaint was not very likely to exist in actions of covenant, because they must be brought upon the contract of the party, and it is therefore not probable that the legislature intended to extend the remedy to such actions. It is evident from that statute itself, that before that statute the sheriff

was bound to take sufficient bail for the appearance of the defendant in all cases; and that he was the judge of its sufficiency. The Act of 1794, c. 54, § 2, makes no exception in favor of actions of covenant, or any other action, and is peremptory upon the Court.

We think, therefore, that the marshal must be amerced to the amount of the damages due from the defendant to the plaintiffs.

THURSTON, J., not having heard the argument, gave no opinion.

WILLIAM ROBINSON v. J. L. CATHCART.

Upon a motion to dissolve an injunction, an averment in the answer, not responsive to any allegation in the bill, is not *per se* evidence against the complainant.

An answer of the defendant, in order to be evidence in his favor, must be an answer to a fact averred in the bill, and not an answer to a mere inference of law.

It is only between equal equities that the rule applies, *prior in tempore, potior in jure*.

A voluntary conveyance is void as to subsequent purchasers for valuable consideration, even with notice.

When husband and wife are codefendants, service upon the husband alone is good service of the *subpana*.

An injunction till answer, will not be dissolved until all the defendants who are interested have answered.

The Court may decree the specific execution of a contract to give collateral security. The answer of one defendant is not evidence for another.

A clause in a contract stating that, "in further confirmation of the said agreement, the parties bind themselves each to the other in the penal sum of \$1000, is not to be considered as liquidating the damages for the breach of the agreement, but as a penalty superadded."

A motion to dissolve an injunction before final hearing, is not, technically speaking, set for hearing on bill and answer.

A cause is not set for hearing on bill and answer, until it is set for final hearing.

A mistake of the law, is not a ground of relief in equity, where no fraud is charged.

When a penalty is inserted in a contract, neither party has a right to avoid the contract by paying the penalty.

Any conveyance executed by a husband in favor of his wife or children, after marriage, which rests wholly on the moral duty of a husband and parent to provide for his wife and issue, is voluntary, and void against purchasers.

If there are several defendants, the Court will not, in general, dissolve the injunction, till all have answered.

THIS was a bill in equity, filed by William Robinson against James Leander Cathcart and others, for the specific execution of a contract for the sale of a tract of land in Fairfax county, in Virginia, by the plaintiff to the defendant, J. L. Cathcart.

The complainant filed a bill in this Court, in Alexandria county, on the 12th of March, 1824, against the defendant, J. L. Cathcart, alleging that on the 10th of September, 1822, he entered into an agreement, under seal, with the said defendant, by which he agreed to sell to the defendant, his farm, called Howard, in Fairfax county, Virginia, for \$8000, [referring to a deed of conveyance from Mr. Law to the complainant,] and con-

Robinson v. Cathcart.

taining 103 acres, as soon as a deed of conveyance with a proper relinquishment of dower, could be made; payable, \$5000 on the 1st of January, 1825, and the balance in three annual instalments, from the 1st of January, 1825, with interest from that day; and that the defendant agreed to give his bonds accordingly, and a deed of trust upon the land, "and on the total amount of his claim on the United States, under the provisions of the 11th article of the treaty with Spain, to the said Robinson as further security for the payment of the said bonds, or purchase-money, as may be agreed by counsel, and effect insurance against fire; and in further confirmation of the said agreement, the parties bind themselves each to the other in the penal sum of \$1000."

That the said treaty with Spain was ratified finally in February, 1821. That shortly after the date of the said agreement the said defendant was put in full and quiet possession of the premises, and has ever since held the same in peaceable and uninterrupted possession. That the necessary deeds, &c., were prepared by the complainant's counsel, and offered to the defendant in June, 1823; but the defendant then objected to receiving and executing them, and still refuses to carry the contract into effect on his part. The complainant states that he is informed and believes that the defendant's chief, if not only, means of paying the purchase-money are to be derived from the claim under the treaty, and that the defendant is using all the means in his power to collect the said claim and so to dispose of it to his own use as that the complainant will be left without redress or the means of obtaining the purchase-money; wherefore he prays for a specific performance of the agreement, and that the defendant may be enjoined from proceeding to collect or receive the money arising from the claim; and for general relief.

On the 6th of July, 1824, the complainant filed another, or supplemental bill in this Court, at Washington, reciting the substance of the former bill, and making that a part of this, and averring that the sale was made in consequence of the defendant's assurances that the Spanish claim should be assigned to the complainant as security for the purchase-money; "that in all the intercourse and negotiations with the said defendant and his wife, Jane Barker Cathcart, who was present and had knowledge of the said bargain and sale, neither he nor his wife intimated in the most remote manner, that any previous lien existed in favor of his said wife on the claim he had on the United States under the said treaty;" but the complainant is informed that the defendant pretends that he had previously assigned the claim to one John Woodside, the father of the defendant's wife, in trust for her use, who is charged with being privy to the arrangement made for the

assignment of the claim to the complainant, but who never informed the complainant that he had such a deed, nor made any objection to the said claim being assigned to the complainant. And the complainant charges a combination between the defendant and wife and Woodside to defraud him of his lien on the said claim, by setting up the said deed of trust, which the complainant charges to be fraudulent and void; that they have called on the accounting officers of the treasury to audit and settle the claim, in order to obtain the amount thereof; and, more effectually to defraud the complainant, they have drawn an order in favor of R. Smith on the proper officer of the government, authorizing the payment of the full amount of the sum awarded to defendant under the Spanish treaty.

The complainant prays an injunction to the said R. Smith, Cathcart and wife, Woodside, Richard Harrison, first auditor, Joseph Anderson, first comptroller, William H. Crawford, Secretary of the Treasury, T. T. Tucker, Treasurer of the United States, &c. &c., which was granted by one of the judges, on the 6th of July, 1824, in vacation.

These injunctions having been served on all but Mrs. Cathcart and the Secretary of the Treasury, the defendant J. L. Cathcart answered the bill, but did not deny its most material allegations. He states that he advertised in the National Intelligencer, his wish to purchase a small farm where he might establish a boarding academy. That the complainant informed him he had a place called Howard, which he believed would suit the views of this defendant, and represented that it was well calculated for such an establishment; that the defendant went to see the place, but the complainant not being there he could not take so full a view and examination, or know the extent and boundaries, as he wished. That the complainant afterwards, in conversation with this defendant, represented that certain land, (which he describes in his answer,) was part of the Howard place. That the place cost him, in money, more than \$8,000, and that he held it at \$10,000. That, confiding in these and divers other representations and statements made by the complainant, and believing, from such representations and statements, that the place was a healthy situation, the soil good, and that it would be in all respects suitable for an academy such as he informed the complainant it was his design to establish, and that the lands included within the bounds of the place, were such as had been pointed out and described (but does not say by whom); and that a plat was ready to be submitted to his inspection, and that the plantation was well worth the sum which the complainant demanded for it, he was induced to sign an agreement for the purchase of it. That at the time of

Robinson v. Cathcart.

executing the agreement he refused to insert \$20,000, or any larger sum than \$1,000, as the penalty, as it might be more for his interest to pay the penalty than to comply with the contract; and positively avers that \$1,000 was inserted with a full belief on his part and with a knowledge of that belief on the part of the complainant, that he might either take the land or pay the said sum at his option. That the said representations and statements have proved utterly fallacious and deceptive. That the place is extremely unhealthy; that the representations as to the value are equally at variance with the truth; that the soil was poor and unproductive; that the complainant had offered it in exchange for property valued at \$5,000; that a considerable part of the land which had been shown and represented (but he does not say by whom,) to this defendant as constituting part of the place, and which was inclosed within the same fence, and added essentially to its value and comfort, did not belong to it; all which matters he pleads in bar of the complainant's claim; and also that the complainant's only remedy is at law, for the penalty. He denies that the complainant tendered to him the papers marked 2, 3, 4, 5, and 6, or any other papers prepared in conformity with the articles of agreement; nor did he exhibit any plat of the premises, which he had engaged to do; nor did he put the defendant in possession of the premises; but the defendant was obliged to pay a large sum of money to the tenant to obtain possession. He avers that the complainant has constantly declared that the property still belonged to him and not to the defendant, and thereby prevented the defendant from enjoying the premises in a full and ample manner.

That the defendant tendered to the complainant a surrender of the premises, and payment of a larger rent than he had received from his former tenant, which the complainant refused. He admits that he frankly stated to the complainant his situation as to pecuniary resources, and that his ability to pay would be wholly dependent upon the amount he should recover under the Spanish treaty. "To this claim, however, this defendant had long since relinquished his right by a conveyance thereof to Mr. John Woodside, as trustee for Jane Banker Cathcart, the wife of this defendant, dated the 10th of November, 1818, and recorded in the land records of Washington county, in the District of Columbia, in Liber A. R. No. 42, fol. 278, as by reference to the same, or by an exemplification thereof, which this defendant has ready to produce, will appear."

He avers that the whole negotiation and contract with the complainant was made without the knowledge or consent of the said John Woodside, and without the assent of the said Jane B.

Cathcart, but with the belief "that the sum to be awarded under the treaty would be at least \$24,000, and that the purchase of the premises would be a judicious investment of part of the said sum, in which the said trustee and *cestui que trust* would concur. But they, finding that the premises did not correspond with the representations which the complainant had made to this defendant, and were not worth the money which had been contracted for as the price, utterly refuse to pay the same under any circumstances."

The defendant further states that Mr. Woodside, as trustee, drew a draft dated 5th January, 1824, in favor of Richard Smith, cashier of the Branch Bank of the United States at Washington, payable out of the amount to be received under the Spanish treaty, to secure certain debts therein specified, which draft was given to and accepted by the said Richard Smith without any notice or limitation of any prior lien; and therefore vested in him a prior right in law and equity to the said proceeds; the whole sum awarded being only \$6,900.27, from which a considerable sum has been deducted as due to the United States; and "that, as the complainant knew that this constituted the only source from which payment could be made, he made the contract subject to this contingency."

Mr. Woodside, in his answer, avers that he was in no degree party or privy to the allegations and averments of the bill in regard to the contract of the other defendant, J. L. Cathcart, and that he has no knowledge further than from the representations of the said Cathcart and the complainant. He relies upon the deed of trust to him in 1818; says that he has no personal interest in the property; and was never consulted by Mr. Cathcart, in reference to the negotiation with the complainant, and never assented to any appropriation of any of the trust funds towards, or for the purchase of any property from the complainant.

None of the other defendants had answered the bill, and the defendants, Cathcart and Woodside, moved for dissolution of the injunction.

Mr. R. S. Coxe, for the defendant, contended that the plaintiff had a remedy at law upon the contract, and therefore could not have relief in equity.

That the Spanish fund had been transferred to Mr. Woodside, in 1818, and the order in favor of Mr. Smith was given in January, 1824, before the injunction was obtained.

That a court of equity never enforces an agreement to give collateral security; and will not decree specific execution of a contract to convey the wife's property; nor what is impossible to be performed; nor where a performance would be a breach of trust;

Robinson v. Cathcart.

nor where a contract is unreasonable ; and that all applications for specific execution, are to the discretion of the Court ; and if not equitable, the Court will leave the party to his remedy at law.

That upon the contract itself he had a right to abandon it upon payment of the \$1,000.

That this Court cannot enjoin an officer of the Treasury. *Ortread v. Round*, 2 Eq. Ca. Ab. 145 ; Gilbert's *Lex Prætoria*, 245 ; *Emery v. Wase*, 8 Ves. 505 ; 1 Maddox, 325, 328, 366 ; Newland on Contracts, 213, 218, 223 ; *Taylor v. Sandiford*, 7 Wheat. 13.

Mr. Jones, contra. The bill in Alexandria was taken for confessed, and there is a decree *nisi* upon it. The bill here is only ancillary to that.

The answer does not deny the allegations of the bill, but sets up an independent defence, which must be proved *aliunde*.

The penalty is no bar to a specific execution. No parol agreement can be set up against a contract under seal ; nor can parol evidence be admitted to show that the contract was different from that which is reduced to writing, and sealed by the parties.

All the correspondence shows that the Spanish fund was relied upon by both parties. It shows, also, that his complaint about the forty acres not being included, is false.

The supplemental bill states that Mrs. Cathcart was present, privy, and assenting to the contract, which is not denied by her husband's answer, or by that of Mr. Woodside.

The deed to Mr. Woodside is a mere voluntary assignment of a chose in action, for the benefit of his wife, without any consideration whatever. The moment it goes into the hands of the wife, it becomes again the property of the husband.

In 1818 there was no treaty with Spain for the payment of this claim. It was a mere possibility, and not the subject of conveyance or assignment. It is, at most, an equitable, not a legal right. But after the treaty, it became a new property, and was, in equity, assigned to the complainant.

Even if it had been real estate, a mere voluntary conveyance would, in equity, be postponed to a *bonâ fide* purchaser for valuable consideration, whether with or without notice. The order in favor of Mr. Smith was only to receive the money for the use of Mr. Cathcart ; at least, there is no evidence to the contrary.

Mistake, fraud, or trust, are the only matters that can be proved by parol, in contradiction to a deed, even by a defendant to a bill for specific performance.

In Wheaton's case, (*Sexton v. Wheaton*, 8 Wheat. 239,) there was no agreement to convey or assign ; nothing but an expression in his letter in which he calls the house his own, when it was his wife's.

A married woman is bound by her fraud; and will also be bound if she stands by and sees her husband dispose of her property, without objection. 8 Wheat. 239.

If this were a final hearing, the Court could not, upon this evidence, decree in favor of the defendant.

Mr. Key, in reply.

This is a new, not a supplemental bill. We might have had one of them dismissed.

The deed, in 1818, contained, besides the assignment of the Spanish claim, household furniture; and, in order to make the deed valid, without parting with the possession, it was recorded according to the Act of Maryland against secret sales.

The smallness of the penalty is evidence that it was intended as liquidated damages.

The plaintiff comes into equity for a specific execution; he must show that he has a fair, legal, and honest claim. All the averments in the answer, showing that it is unconscientious in the complainant to enforce the contract, are averments responsive to the bill. The allegation, that the plaintiff has a right to specific execution, makes those averments evidence for the defendant.

Parol evidence may be admitted to show that a material part of the agreement has been omitted, by mistake.

The word "penalty" is immaterial. The intention of the parties must decide whether it be a penalty, or liquidated damages. If it be doubtful, or if the omission be by fraud or mistake, parol evidence is admissible. *Mechanics Bank of Alexandria v. Bank of Columbia*, 5 Wheat. 326; *Union Bank v. Hyde*, 6 Ib. 572; *Ross v. Norvell*, 1 Wash. 15; *Roberts on Frauds*, 82; 1 *Mad-dox*, 405, 406, 321, 322.

The averment that the agreement was, that the parties might abandon, on payment of the penalty, is responsive to the allegations of the bill.

Mr. Robinson can only be considered as a subsequent creditor, not a subsequent purchaser. (*Sexton v. Wheaton*, 8 Wheat. 239.) The case of Mrs. Wheaton is much stronger against her than this is against Mrs. Cathcart. Even if she was present, and knew of her husband's offer of this fund, as security, and did not disclose her interest, she cannot be bound. She is no party to this suit; the *subpoena* against her is returned *non est*, and she has not appeared.

June 4, 1825. CRANCH, C. J., (after stating the substance of the bill and answers,) delivered the following opinion:

The defendants, Cathcart and Woodside, now move for a dissolution of the injunction.

The only important averment of the bill which is denied by

either of the answers, is that which charges that the defendant Woodside was privy to the arrangement made for the assignment to the complainant of the Spanish claim.

It is very doubtful whether the alleged misrepresentations, previous to the conclusion of the contract, can be given in evidence at all, in this case, no fraud being charged. *Iraham v. Child*, 1 Br. C. C. 91. But, admitting that they may, their averment in the answer, not being responsive to any allegation of the bill, is not, *per se*, evidence against the complainant. They constitute an independent defence, (if they be a defence,) consistent with all the allegations of the bill. The answer of a defendant, in order to be evidence in his favor, must be an answer to a fact averred in the bill, and not an answer to a mere inference of law. The claim of a right to a decree for specific performance is not such an averment as will make the defendant's allegation of new justificatory facts (not repugnant to the averment of facts in the bill,) evidence for the defendant.

Laying aside, then, all the allegations in the answers which are not responsive to the averments in the bill, the principal question is, whether, exclusive of the averment of Mr. Woodside's privity in the arrangements of Mrs. Cathcart for the assignment of his Spanish claim, there be equity enough left in the bill to support the injunction till final hearing.

Upon this question it is material to inquire whether the equity of Mrs. Cathcart, whose interest is set up as a bar to the relief sought by the complainant, be equal to that of the complainant; for it is only between equal equities that the rule applies, "*prior in tempore, potior in jure.*"

The deed of trust to Mr. Woodside is a mere voluntary assignment, without any consideration averred, excepting the existence of two prior assignments, equally voluntary, and made directly from the husband to the wife. (See 1 Maddox, 216, &c.) A voluntary conveyance is void as to subsequent purchasers for valuable consideration, even with notice. (See also Sugden, 434, 439; *Leach v. Dean*, 1 Rep. in Chancery, 146; *Parry v. Corwarden*, Dick. 544; *Powell v. Pleydell*, 18 Vin. Ab. D. pl. 5.) And, as it is not provided in the deed that the property should be free from the control of the husband, it seems probable, that, as soon as any part of the money came to the hands of the wife, it would be vested absolutely in the husband.

But the complainant stands in the position of a subsequent purchaser, for valuable consideration, without notice. *Bath and Montague's Case*, 3 Ch. Ca. 123. It is evident that the Spanish fund entered into all the considerations of the complainant and Mr. Cathcart, from the very commencement of the negotiation to

its consummation. The complainant would not have contracted with the defendant but for that fund; and it is evident, both from the bill and answer, that he must depend upon that fund to reap the benefit of his contract.

These circumstances, in my opinion, place him on higher equitable ground than that on which Mrs. Cathcart stands, even without supposing her to have been present at the bargain, and not objecting, or mentioning her claim, as averred in the bill and not denied in the answer. (Sugden, 434, 439, 477, 480, 482; *Sexton v. Wheaton*, 8 Wheat. 239.)

If the *subpœna* had been served upon Mrs. Cathcart, I should have thought that her answer would have been indispensable before the injunction could be dissolved. Service upon the husband alone is good service of the *subpœna* when husband and wife are codefendants, (Eden on Injunctions, 52; *Sir William Pulteney v. Shelton*, 5 Ves. 147, corrected by the errata; and the Court will not dissolve an injunction until all the defendants have answered; Eden, 89,) and as Mrs. Cathcart's trustee and her husband are made parties, and have been summoned, and as there can be little doubt that she has knowledge of this bill, and might have appeared and answered if she would, I am still strongly inclined to think that that circumstance is a sufficient ground to refuse a dissolution of the injunction at this time.

But it is contended that the Court cannot decree specific execution of a contract to give collateral security. I know of no decision to that effect. None such has been cited. (2 Com. Dig. Chan. 2, C. 16; *Buxton v. Lister*, 3 Atk. 383; 2 Com. Dig. 340, 2 C. 1.)

As to the claim of Mr. Smith, it may be observed, that the answer of one defendant is not evidence for another. It is a sufficient answer to this claim, that Mr. Smith has not answered the bill, and therefore the injunction cannot be dissolved in his favor; and, as Mr. Woodside admits, in his answer, that he had drawn a bill in favor of Mr. Smith for the whole amount of the fund, it cannot be dissolved in favor of Mr. Woodside; and no one will contend that Mr. Cathcart is entitled to receive the fund in violation of his contract with the complainant, his assignment to Mr. Woodside, and the bill in favor of Mr. Smith.

It is said, also, that the Court cannot decree a specific performance of a contract by the husband to convey the property of his wife.

But it is yet to be determined whether this is the wife's property, as against this purchaser, for valuable consideration. A like answer may be given to the objection, that the Court will not decree a performance which would be a breach of trust. It is

yet to be determined whether the trust is not void as against this complainant.

I give no opinion as to the objection that the bill in Alexandria is taken for confessed; as it seems to be admitted that it was intended to file an answer in that case; and as this really involves the whole question there.

I do not think that the agreement itself will bear the construction, that "the penal sum of \$1000," is to be considered as liquidated damages. (*Howard v. Hopkins*, 2 Atk. 371.) There is no case in which such a construction has been given to such an instrument; and the averment that such was the understanding of the parties, if allowed to be a defence, must be proved by other evidence than the answer of the defendant. Upon the whole, I think the injunction ought to be continued until final hearing.

I give no opinion as to the effect of the injunction upon the officers of the treasury department; if they choose to respect it, very well; if they do not, it will be then time enough to question the power of this Court to enforce it.

THRUSTON, J., did not concur; and MORSELL, J., not having heard the argument, gave no opinion. The effect of this division of opinion was, that the injunction could not then be dissolved, and the cause was continued to the next term.

After the foregoing opinion was delivered, *Mr. Coxe*, the defendant's counsel, suggested a doubt whether the ground taken in that opinion was correct, viz.: That the answer is to be considered as evidence for the defendant, so far only as it is responsive to some allegation in the bill; *Mr. Coxe* seeming to be of opinion that the answer is to be taken as true in every particular, in the same manner as if the cause were set for final hearing upon bill and answer; and in support of his view of the case, he cited *Barret v. Blgrave*, 6 Ves. 104; *Hanson v. Gardner*, 7 Ves. 305; *Gourlay v. Duke of Somerset*, 1 Ves. & Beame, 68; *Bishton v. Birch*, Id. 365; and 2 Ves. & Beame, 40, 44, S. C.; *Kingston v. Eve*, 2 Ves. & B. 349; *Couch & al. v. President and Directors, &c.* 4 Johns. Ch. R. 26.

In answer to this suggestion, CRANCH, C. J., submitted to the counsel for the parties, in vacation, the following opinion:—

When the plaintiff has replied to the answer, and the cause is at issue, I presume it will not be denied that the answer is evidence for the defendant, so far only as it is responsive to some allegation in the bill. If this position be denied, I refer to *Beckwith v. Butler*, 1 Wash. 225; *Hoomes, Executor of Elliott, v. Smock*, 1 Wash. 389; *Chapman v. Turner*, 1 Call, 286, 288; *Maupin v. Whiting*, 1 Mun. 373, 398; *Pryor v. Adams*, 1 Call, 382, 394; *Bullock v. Goodall*, 3 Call, 44; *Auditor v. Johnson*,

1 Hen. & Mun. 537, 542; *Dangerfield v. Claiborne*, 2 Hen. & Mun. 17; *Page v. Winston*, 2 Mun. 298; *Scott v. Gibbon*, 5 Mun. 86; *Thompson v. Strode*, 2 Hen. & Mun. 19; *Leeds v. Marine Ins. Co.* 2 Wheat. 383; *Young v. Grundy*, 6 Cranch, 51; *Hart v. Ten Eyke*, 2 Johns. Ch. R. 287; *Ringgold v. Ringgold*, 1 Har. & Gill, 28. I do not remember that I ever heard this point controverted, and I am sure that it has been considered by this Court as completely settled for more than twenty years.

The only reason why the answer of the defendant is considered as evidence in his favor, is, that the plaintiff has called upon him to answer as a witness, and is therefore bound to admit his answer, so far as he has called for it, to be *primâ facie* true, and as worthy of credit as the testimony of any other witness. But when the defendant, in his answer, avers a fact respecting which the plaintiff has not required his answer, there is nothing to make that averment evidence for the defendant; and it stands on the same ground as the averment of a defendant at law in the ordinary course of pleading, and must be sustained by evidence *aliunde*. The case is different when the cause is set for hearing on bill and answer, without a replication. It is stated in *Cursus Cancellariæ*, 149, that "when the plaintiff finds sufficient matter confessed in the defendant's answer whereon to ground an order or decree, he may proceed to a hearing upon the bill and answer," "and in such cases the answer is to be admitted true, in all points as to the particulars charged in the bill; and no other evidence is to be read than what arises from the answer itself."

And in Harrison's Ch. Pr. 601, it is said, "The method of hearing a cause, upon bill and answer, is generally thus: after the substance of the bill has been opened by the junior counsel, and the matter of equity thereof duly represented to the court, the answer of the defendant is to be stated in the same manner by his counsel, and must be admitted as true in all points as to the particulars charged in the bill, and no other evidence is to be given than what arises from the answer itself, or being matter of record to which the answer refers, and which is provable by the record. But note; in many instances, though the cause requires no witness, yet it may be necessary for the plaintiff to reply, &c., whereby the defendant will be put upon proof of his answer, and the plaintiff admitted to prove the matters of the bill."

Although these authorities seem to show that the answer is to be taken as true only in regard to "the particulars charged in the bill," yet I apprehend the rule to be, that when the plaintiff sets the cause for hearing upon bill and answer, without a replication, which he always has a right to do, the answer must be taken to be true in all its allegations, whether they be or be not

responsive to the allegations of the bill ; and the reason is, because the plaintiff, by setting the cause for hearing on the bill and answer, has deprived the defendant of the power of proving them by evidence *aliunde*. The setting the cause for hearing on the bill and answer is the plaintiff's own voluntary act, and the defendant has no right to ask for a commission to examine witnesses, nor to produce any evidence whatever, other than his own answer. He cannot object to the trial of his cause upon his own representation of it.

But upon a motion to dissolve an injunction, the case is different. It is a motion made by the defendant against an unwilling plaintiff. The motion must be heard whether the plaintiff consent or not. He has done nothing to prevent the defendant from proving his case by the ordinary modes of proof. He has not waived his right to reply to the answer, and to put the defendant to his proof. He has either replied, or may reply ; and his not having replied, at the time the motion is made, is not an admission of the truth of the answer. The motion is generally made upon filing the answer, and before the plaintiff has had time to consult counsel, whether to except or to reply.

It has been the uniform practice of this Court to refuse to dissolve the injunction, unless the answer deny fully and explicitly all the equity of the bill, although no exceptions are taken to the answer. In *Young v. Grundy*, 6 Cranch, 51, the Supreme Court of the United States said, "If an answer in chancery neither admits nor denies the allegations of the bill, they must be proved on the final hearing ; but upon the question of dissolution of an injunction, they are to be taken as true."

I imagine, therefore, that the plaintiff was not bound to decide whether he would, or would not, reply upon the hearing of the motion to dissolve. But in this case, before the argument upon the motion to dissolve was concluded, I recollect hearing *Mr. Jones* direct the clerk to enter a general replication to the answers. This, however, I did not deem important at that time, for I then supposed, and still suppose, that while the plaintiff has the right to reply, the answer, so far as its character and effect as evidence is concerned, must be regarded in the same manner as if the replication had been filed. If not, the injunction might be dissolved on motion, and reinstated upon final hearing, upon the same evidence. For it may happen that upon the final hearing, the defendant may not be able to bring any evidence in support of the new and irresponsible allegations set up in his answer, and upon the strength of which the injunction was dissolved : and the whole equity of the plaintiff's bill may, as in the present case, stand admitted by the answer.

In the mean time, however, irreparable injury may have been done by dissolving the injunction. The safest course, therefore, is that which this Court has always pursued ever since its establishment in 1801, to wit, to consider the answer as evidence only so far as it is responsive to the allegations of the bill, unless upon final hearing on bill and answer.

Before I proceed to notice the cases cited in support of the doctrine, that upon the motion to dissolve an injunction, the answer must be considered as true in every particular, I would observe that there seems to be a difference, in practice, between the Courts of Chancery, in England, and the courts of Maryland and Virginia, whose practice this Court adopted as it found it, when this Court was first established.

In England, in general, injunctions are not granted until the time for appearing, or answering, which is very short, has expired, and the defendant has failed to appear, or to answer, when, if an injunction has been prayed by the bill, and affidavit made, it is issued, of course, until answer. Upon the coming in of the answer, the injunction is dissolved, of course, by its own limitation, unless the plaintiff, having had notice, show cause for continuing it. Eden, 55, 57, 59.

"Though an injunction" (in England) "will not be granted before answer, on the sole ground that the plaintiff" (at law) "will otherwise be entitled to sue out execution before the common injunction can be obtained, yet special injunctions to restrain proceedings at law, will sometimes be granted, where the plaintiff has had no opportunity of obtaining the common injunction." *Franklin v. Thomas*, 3 Merivale, 225. As in the case of *Annesley v. Rookes*, 3 Meriv. 226, where upon affidavit of facts, "it being the vacation and no *subpoena* returnable until the next term, Lord Eldon granted the injunction; the plaintiff undertaking to serve the defendant with immediate notice, and with liberty to the defendant to apply during the continuance of the sittings." Eden, 64.

"The injunction, issued for the default of the defendant in not appearing or answering, is called the common injunction." Eden, 68. A special injunction is generally granted, until answer or further order. Eden, 325. "A special injunction is usually obtained, upon motion, on certificate of bill filed and affidavit filed verifying the material circumstances. But in the vacation, when the court does not sit, and no motion can consequently be made, a judge of a court of equity will grant an injunction upon petition, with affidavit, and certificate of bill filed." Eden, 320. No bond or security are required. "If it be granted before answer, 'tis commonly till answer and further order." Eden

Robinson v. Cathcart.

says "or" further order. "Where an injunction is so granted, then, after answer has come in, if the counsel of the defendant allege that the defendant has answered and denied the whole equity of the plaintiff's bill, (his contempts, if any, being cleared and his appearance entered,) and also produce a certificate from the six clerks that the answer has been filed fourteen days at least, the court will, on such counsel's motion, order the injunction to stand dissolved at a short day, *nisi causa*, &c.; and perhaps without such certificate. If, at the day, no cause be shown, then, upon affidavit of due service of the order, and on motion, the order will be made absolute." Practical Register in Chan. 198, 199.

But here, according to the practice of Virginia and Maryland, as adopted in this Court, injunctions are generally granted by a judge in vacation, and are to continue until the further order of the Court. If they are to stay judgments at law, bond and security are required. Upon filing his answer the defendant gives notice of his motion to dissolve; and he must support his motion by showing that he has answered all the equity of the bill. Upon the motion to dissolve, all the allegations of the bill, not denied by the answer, are to be considered as true. *Young v. Grundy*, 6 Cranch, 51.

But it is contended, that in England, upon the motion to dissolve, or rather, upon the rule to show cause, the answer is to be considered as true in every particular. No case is cited in which that point has been decided; but cases are cited which, it is said, seem to take the principle for granted, by deciding the question of dissolution upon facts, stated in the answer, which are not responsive to any allegation of the bill. Admitting that to be the fact, that is, that in those cases the court dissolved the injunction upon irresponsive facts set up in the answer, no objection having been made upon that ground, I do not think the cases ought to be considered as overruling the general principles which I have adduced in support of the contrary doctrine.

Let us now, however, examine those cases.

The first is *Barret v. Blagrove*, 6 Ves. 104. The marginal note of the case is, "The injunction obtained upon a breach of covenant, in nature of a specific performance, dissolved upon the answer, contradicting the affidavits, and showing consent for several years."

The injunction had been granted upon default of appearance, and upon affidavits stating that the defendant held under a lease from the proprietors of Vauxhall gardens, by which the tenant had covenanted not to carry on the trade of victualler, retailer of wine, &c., or any employment that would be to the damage

of those proprietors; upon penalty of forfeiture of the lease, and payment of £50 a month to the lessors. That the defendant kept a house of public entertainment where all sorts of refreshments and liquors were supplied, so as very materially to interfere with Vauxhall gardens; above one hundred persons in a night having quitted the gardens and gone to this house for refreshment and returned to the gardens afterward.

The answer denied, that the defendant kept such a house as contemplated by the covenant in the lease; that it was fitted up to accommodate persons coming from Vauxhall; that he retailed liquors; and that any persons resort to the house from the public gardens for refreshment and return afterwards.

It averred that the defendant kept the same kind of house, with the knowledge of the lessors, before and at the time the lease was signed; and before the execution of the lease the agent of the lessors signed a memorandum consenting that this trade should not be considered a breach of the covenant, and stating that the tenant's mode of using the house was not injurious to the proprietors of the gardens nor contrary to the lease; that the defendant continued to carry on the business in the same way from that time to the date of the injunction, (11 years,) without objection. That the persons resorting to the house consist of hackney-coachmen, mechanics, &c., and the business is confined to the sale of meat, as a cook's shop.

It will be perceived at once that the answer denies all the facts raising the equity upon which the injunction was granted; and upon that ground the injunction was rightly dissolved. It is true that the Chancellor said that the case made out by the plaintiff's affidavits, upon which the injunction was granted, was within the terms of the covenant, and stated the long acquiescence of the plaintiff as a reason for refusing to decree a specific performance of the covenant, although that acquiescence was a fact stated in the answer, and was not perhaps strictly responsive to any allegation of the bill; but not having the bill before us we cannot say whether it was responsive or not. As there was, without that fact, sufficient ground for dissolving the injunction, it is not probable that the Chancellor ever considered whether it was or was not responsive to the allegations of the bill.

The next case cited, is *Hanson v. Gardner*, 7 Ves. 305. This was "an injunction against cutting; and pasturing cattle in a wood; the plaintiff praying the injunction as tenant in fee; or as lord of the manor inclosing under the statute; the defendants denying the former title; and as to the latter claiming common of pasture and estovers; and stating that after the inclosure, sufficient common of pasture would be left."

Here it will be observed that the title in fee, set up by the plaintiff, is expressly denied by the answer. The other title, that is, as lord of the manor inclosing under the statute of Merton, could be claimed only by an averment that the plaintiff had left the tenants sufficient common of pasture and estovers. The denial, therefore, of the defendants, in their answer, that the plaintiff had not left them sufficient common of pasture was the direct denial of an allegation which was, or ought have been in the bill, so that the whole equity of the bill was denied by the answer; and the injunction must have been dissolved without recurring to other facts stated in the answer which were not strictly responsive to any allegation of the bill; and if the Chancellor, in giving his opinion, referred to those facts, without regard to the question of their responsiveness, it affords but a weak argument in support of the doctrine, that upon a motion to dissolve an injunction, the answer is to be considered as true in every particular.

The next case is that of *Gourlay v. Duke of Somerset*, 1 Ves. & Beames, 68.

In this case the plaintiff, who had been in possession of the land three years under the defendant's written agreement, sought a specific performance of the agreement, and an injunction to restrain the defendant from proceeding at law, in ejectment. The defendant, in his answer, admitted the agreement, but alleged specific instances of improper cultivation of the farm, and waste by the plaintiff; and the plaintiff's refusal of the lease, when tendered by the defendant, the plaintiff saying he considered the agreement sufficient for him.

The Chancellor continued the injunction upon the plaintiff's agreeing to deliver possession when required by the court, and paying the rent due, notwithstanding the facts thus set up in the answer; which seem to have been admitted as true both in the argument of counsel, and in the opinion of the court; no objection having been made on the ground of their not being responsive to the bill. And upon the want of that objection rests the weight of the argument to be drawn from that case.

The cause was argued by able counsel on the part of the plaintiff, and their failing to object to the answer as evidence of those facts affords strong ground to believe that such an objection would not have been sustained. But it is not a decision upon the point; the Chancellor did not dissolve the injunction upon those facts; and, at most, it only shows that such facts may be taken into consideration by the Chancellor, in a question to his discretion, which a prayer for specific performance always is, but not in every question of dissolution of an injunction.

The next case cited is *Bishton v. Birch*, 1 Ves. & B. 365.

An injunction to stay proceedings at law had been obtained for want of an answer; and the plaintiff, on affidavits, moved to extend the injunction to stay trial at law. This was objected to, on the ground that the answer was just filed at the time of hearing the motion. Before the motion was decided the plaintiff filed exceptions to the answer, and the defendant submitted to make a better answer. The Chancellor being of opinion that an insufficient answer is no answer, extended the injunction to stay the trial. I do not see what bearing this case has upon the present question. The most, that can be inferred from it, is, that if the answer had been good the Chancellor would not have extended the injunction to stay trial.

The next case cited is *Bishton v. Birch*, again, in 2 Ves. & B. 40, 44.

The points decided in the case are, 1st, That an injunction to stay proceedings at law, is dissolved upon the master's report that the answer is sufficient, (the plaintiff having filed exceptions to the answer, by way of showing cause why the injunction should not be dissolved,) and the order for dissolving the injunction is not suspended by the plaintiff's filing exceptions to the master's report. And 2d, That the order extending the injunction to stay trial at law, falls with the original injunction, and the plaintiff cannot, afterwards, show cause on the merits. The reason stated is, that when the plaintiff shows exceptions for cause, he comes under the obligation to procure the master's report of insufficiency in four days.

I do not see how this case bears upon the argument, or how it tends to show that upon the motion to dissolve, the answer is to be taken to be true in every particular.

The next case cited is *Kempton v. Eve*, 2 V. & Beames, 349. The bill stated a lease. The answer denied the existence of the lease, and stated that the pretended lease, which was made under a power, was void. This answer seems to be responsive to the bill, and as the injunction was dissolved upon that allegation, the case furnishes no argument upon the present question.

The last case cited is that of *Couch et al. v. The President and Directors of the Ulster and Orange Turnpike Company*, 4 Johns. Ch. R. 26.

In that case the question was not made whether the facts stated in the answer were responsive to the allegations of the bill. That point seems to have been taken for granted; and it is evident that the material allegations of the bill upon which the plaintiff's equity was founded, were denied by the answer. The bill stated that the commissioners of the road had so long delayed to make

the assessment, that the time given, by the charter, to the plaintiffs to make their proportion of the road instead of paying their assessment in money, had expired, and that they were thereby deprived of the advantage intended to have been secured to them, by the second section of the charter; and upon that ground, principally, prayed for an injunction to prevent the company from proceeding to sell the plaintiffs' lands for their default in not paying the assessment in money.

The answer stated that the assessment was made on the 8th of April, 1818, of which due notice was given, and that the plaintiffs had full time and opportunity to avail themselves of the benefit of the charter.

This was a direct denial of the equity of the bill, and upon that ground, connected with a construction of the charter differing from the construction contended for in the bill, the injunction was dissolved.

I do not, therefore, consider that case, as in any manner supporting the doctrine, that upon a motion to dissolve an injunction, the answer is to be taken as true in every particular, whether responsive, or not, to the allegations of the bill. And that this was not the opinion of the Chancellor in that case, is evident from what he says in the same book, p. 497, in the case of *Minturn v. Seymore*, where he lays down the general principle, that "where a defendant, in answer to an injunction bill, admits the equity of the bill, but sets up new matter of defence on which he relies, the injunction will be continued to the hearing," and refers to the case of *Allen v. Crobrot*, Barnard. Ch. Rep. 373, for the general rule to that effect.

The result of these authorities cited by *Mr. Coxe*, is that in two or three cases, where no objection was made to it, the court did, upon motion to dissolve, take into consideration circumstances stated in the answer which do not appear to have been responsive to the bill. But it does not appear to me that the argument to be drawn from those cases, is sufficient to overthrow the general principles upon which I conceive the opposite doctrine to be founded.

But it is said that upon a motion to dissolve an injunction, the cause is always heard on bill and answer. This, certainly, must be a mistake. When a cause is said to be "heard on bill and answer," the expression is always technical, and understood technically to mean the final hearing when the cause has been set for hearing by the plaintiff, or by consent of the parties upon bill and answer alone without replication. But upon a motion to dissolve an injunction, the cause is not heard; the motion only is heard, the cause is not set for hearing, and the doctrine that the answer

must be considered as true in every particular, applies only to a cause set for hearing on bill and answer.

Upon the whole, I still think that the position, which I took in giving my opinion upon the motion to dissolve the injunction, was correct; namely, that the answer is evidence of such facts only as are responsive to the allegations of the bill. See also *Skinner v. White*, 17 Johns. Rep. 366, 367.

Having been of that opinion, it was unnecessary to consider what effect the new facts set up in the answer, if true, would have upon the question of dissolution; but as the correctness of that opinion is questioned, it may be well now to go into that consideration.

The answer avers misrepresentations on the part of the plaintiff; namely, 1. That the plaintiff informed the defendant that he believed that his place called "Howard," would suit the views of the defendant. 2. That the plaintiff represented that it was well calculated for such an establishment as the defendant had described in his advertisement. 3. That certain land (which the defendant describes) was part of the Howard place. 4. That the Howard place cost him more than \$8,000, and that he held it at \$10,000.

These representations and statements the defendant avers, "have proved utterly fallacious and deceptive," but he does not aver them to be false; nor to have been fraudulently made; nor to have been made with a knowledge that they were not true; nor do the representations seem to be material; except that, respecting the land supposed to be included in the Howard place; with regard to which the defendant avers, "that a considerable part of the land which had been shown and represented to him," (but does not say by whom) "as constituting part of the place, and which was inclosed within the same fence, and added essentially to its value and comfort, did not belong to it." The averment is very loosely made, and as no fraud is alleged I should not think it a sufficient ground to refuse to decree a specific performance of the contract. These are the only misrepresentations, on the part of the plaintiff, averred in the answer.

The answer avers that the place is extremely unhealthy. That the representations as to the value are equally at variance with the truth. That the soil was poor and unproductive, and that the plaintiff had offered it in exchange for property valued at \$5,000. But it does not aver that the plaintiff made any representations as to the healthiness, or the value, or the quality of the land. These averments, therefore, are quite immaterial. There are several other immaterial averments, in the answer, which were not insisted upon in the argument, and which I omit to notice; such

as, that the plaintiff did not exhibit a plat; that the defendant had to pay money to the tenant in order to obtain possession; that the plaintiff has constantly declared that the property still belonged to him; that the defendant offered to surrender the premises and to pay a rent, &c. &c.

But there is an averment, which, as it was relied upon by the defendant's counsel, may be properly noticed, if any of the irresponsible averments can now be considered.

The defendant, Mr. Cathcart avers that the penalty of \$1,000 was inserted, with a full belief on his part, and with a knowledge of that belief on the part of the plaintiff, that he might either take the land, or pay the penalty. It is not, however, averred that he was led into the belief by the plaintiff, nor that he entertained that belief at the time of executing the contract; nor does he aver a tender of the penalty; nor does he, in his answer, offer to pay the penalty. He intimates that the reason why he would not agree to a larger penalty than \$1,000, was, that it might be more for his benefit to pay the penalty than to comply with the contract; but he does not aver that he ever gave such a reason to the plaintiff; nor does he aver any fraud on the part of the plaintiff. If this comes under the head of mistake, it must be a mistake of the law. He did not understand the legal import of the instrument which he signed. But this is not a ground of relief in equity, where no fraud is charged. See *Lord Irnham v. Child*, 1 Bro. C. C. 91; and *Howard v. Hopkyns*, 2 Atk. 371, in which case there was a proviso in the agreement "that if either side should break the agreement, he should pay £100 to the other." The defendant contended "that it was the intention of the plaintiff and defendant that upon either paying £100 the agreement should be absolutely void."

The Lord Chancellor said, "As to the defence of a stipulated sum, I cannot take this to let off either party when they please, but to be no more than the common case of a penalty; for it might be inserted by the plaintiff in order to be paid for his trouble in viewing and measuring the estate, taking plans, &c., supposing the defendant would be able to make out a title." "In all cases where penalties are inserted in case of a non-performance, this has never been held to release the parties from their agreement, but they must perform it notwithstanding." See also *Hopson v. Trevor*, 1 Str. 533; *S. C. 2 P. Williams*, 191; *Parks v. Wilson*, 10 Mod. 515; *Lennon v. Napper*, 2 Sch. & Lef. 684; *Margrave v. Archbold*, 1 Dow. 107; *Telfaire v. Telfaire*, 2 Dessaus. Rep. 271; *Sugd. Vend.* 163; 2 Amer. ed. Phila. 1820.

Fonblanque, vol. 1, p. 108, says, "As to ignorance of law, it may be laid down as a general proposition, that it shall not affect

agreements, nor excuse from the consequences of particular acts, even in courts of equity."

Eden on Injunctions, pp. 9, 10, says, "There are numerous cases in which the court has refused to interfere, where an instrument has been executed, or a sum of money paid, under an erroneous notion of the law." *Mildmay v. Hungerford*, 2 Vern. 243; *Harman v. Camm*, 4 Vin. Ab. 387; *Willey v. Coopers Company*, 3 P. Wins. 127, note; *Atwood v. Lamprey*, Id.; *Lord Irnham v. Child*, 1 Bro. C. C. 92; *Langstaffe v. Fenwick*, 10 Ves. 406; *Currie v. Goold*, 2 Mad. Rep. 163.

We may now, therefore, consider the maxim, "*Ignorantia juris non excusat*," as fully recognized in equity, as it has been unquestionably established, in civil cases, at law. In a note he cites Dig. 22, tit. 6, & Cod. 1, 18, *De juris et facti ignorantia*; and Code Napoleon, 2052, 2053, 2058.

If, therefore, the allegation in the answer is to be understood as an averment of the defendant that, at the time of executing the contract, he supposed he had a right to dissolve it upon paying the penalty, and if that averment must be taken as true, it is no ground, in equity, for refusing a specific performance of the agreement.

"An agreement, if impeached, must be so at the time of its commencement; nothing subsequent can impeach it. 1 Atk. 104. A failure in a speculation forms no ground to resist a specific performance. *Adams v. Weare*, 1 Bro. C. C. 569;" 1 Maddock, 324, 408.

"A court of equity will never decree iniquity, and there are instances where they have refused to decree hard bargains, though fair; but these are rare, and are generally cases of glaring hardship. For, in general, the court will never undertake to estimate the speculations of parties in a contract, but will deem them the best judges of their own views, and will compel a performance though they may be eventually disappointed in their expectations." *Ward v. Webber and Wife*, 1 Wash. 274.

The assignment of the Spanish fund to Mr. Woodside, for the use of Mrs. Cathcart, being voluntary, is void as to the plaintiff, who is a purchaser for valuable consideration, without notice. 1 Maddock, 216, 271.

"It is now fully settled, upon the Stat. of 27 Eliz. c. 4, (a statute passed to prevent frauds on purchasers,) that a voluntary settlement, however free from actual fraud, is, by operation of that statute, deemed fraudulent and void against a subsequent purchaser for valuable consideration, even where the purchase has been made with notice of the prior voluntary settlement. The statute receives the same construction, and produces the

same effect, both in law and equity; and the purchaser of an equitable estate, for a valuable consideration, though with notice, is no more affected by a voluntary settlement, than the purchaser of a legal estate." *Buckle v. Mitchell*, 18 Ves. 110; *Pulvertoft v. Pulvertoft*, 18 Ves. 90; *Metcalf v. Pulvertoft*, 1 Ves. & B. 183, 184; *Otley v. Manning*, 9 East, 59; *Hill v. Bishop of Exeter*, 2 Taunt. 69; *Evelyn v. Templar*, 2 Bro. C. C. 148; *Serhouse v. Earle*, Ambler, 288; 1 Eq. Ab. 334; *Doe v. James*, 16 East, 212; *Townsend v. Windham*, 2 Ves. 10.

"Any conveyance, executed by a husband in favor of wife, or children, after marriage, which rests wholly on the moral duty of a husband and parent to provide for his wife and issue, is voluntary and void against purchasers, by force of the act." Sugden, 434.

"A purchaser, without notice of a voluntary settlement, may compel a performance, *in specie*, of the agreement, although the settlement were made *bonâ fide*." Sugden, 439.

"If a person, having a right to an estate, permit, or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right, although covert, or under age." Sugden, 480.

"Service upon the husband alone is good service of the *subpœna*, where the husband and wife are co-defendants." Eden, 52.

"If there are several defendants the court will not, in general, dissolve the injunction till all have answered." Eden, 89.

Mr. Smith and Mrs. Cathcart, who are the principal defendants in regard to the Spanish fund, have not answered. Neither Mr. Cathcart, who has assigned all his interest in that fund to Mr. Woodside, nor Mr. Woodside, who has assigned all his and Mrs. Cathcart's interest in it to Mr. Smith, have any right to ask for a dissolution of the injunction.

But if all the defendants had answered, and all the allegations, in the answers of Mr. Cathcart and Mr. Woodside, were to be taken as true, I should not think them sufficient to prevent a decree for a specific execution of the contract.

Upon every ground, therefore, I think the injunction ought to be continued until final hearing.

At a subsequent term the question of dissolution was submitted by the parties to MORSELL, J., who, after examining the case, concurred with CRANCH, C. J., and the injunction was continued till final hearing, THRUSTON, J., dissenting; and by consent of the parties the money was drawn from the treasury and invested in productive funds.

Ex parte Bennett.

Ex parte N. V. H. BENNETT.

A warrant of commitment must be under the seal of the committing magistrate, and must show a charge upon oath.

Upon *habeas corpus*, if the commitment be informal or insufficient, the Court will discharge the prisoner from that commitment, but will recommit him in proper form, if there be sufficient cause.

If the commitment be regular and formal, and for an offence for which the committing magistrate had a right to commit, it seems that the Court, upon *habeas corpus*, will, upon the request of the prisoner, issue a *certiorari* to the magistrate, to certify the informations, examinations, and depositions taken by and remaining with him in relation to the commitment; and if none such shall have been taken, will summon him to appear and state upon oath the evidence upon which he issued his warrant of commitment; and upon ascertaining such evidence, will consider the same and will bail, remand, or discharge the prisoner, unless he shall desire that the witnesses may be reexamined, in which case he will be remanded until the witnesses can be had.

UPON the return of the *habeas corpus*, in behalf of N. V. H. Bennett, it appeared that he was committed by virtue of the following warrant:

“District of Columbia, Washington county, ss.

“Whereas, on the information of Samuel C. Raymond on oath, it has been made to appear that N. V. H. Bennett, now before me, being accused of having feloniously stolen and taken away from four to five hundred dollars in bank-notes the property of one N. Wood; and wearing apparel, to wit: one pair of blue ribbed pantaloons, two shirts, &c., the property of J. Scott, on examination and search made, one pair of pantaloons and two shirts bearing the description given by said Raymond before the examination, were found on the said Bennett; and he not having it in his power to give the required security for his appearance, he is therefore hereby committed to your jail and custody for future examination, or till he shall be otherwise released according to law.

“Witness my hand this 26th day of May, 1825. Daniel Rapine. George H. Gloyd will execute this complaint. D. R.”

To the marshal, District Columbia.

Mr. Jones, for the prisoner, moved for his discharge.

1. Because the warrant is not under seal; and does not charge any offence upon oath.

2. Because the offence, if any appears by the evidence to have been committed in New York, cannot be tried here.

He cited 1 Chitty, Crim. Law, 33, 89, 93, 94, 95, as to the form of the warrant; and contended that the magistrate had no right to commit for an offence committed out of this district, unless upon demand from the executive of the State in which the offence was committed. Constitution of United States, Art. 4,

Ex parte Bennett.

§ 2; Judiciary Act of 1789, § 33, [1 Stat. at Large, 73;] The Act of 12th of February, 1793, [1 Stat. at Large, 302,] respecting fugitives from justice; The Act of 3d of March, 1801, § 6, [2 Stat. at Large, 116,] as to fugitives in the District of Columbia; *The People v. Jess*, 2 Caines, Rep. 213; *Simmons v. Commonwealth*, 5 Binney, 617; *The People v. Gardner*, 2 Johns. 477, 479; *Commonwealth v. Cullins*, 1 Mass. 116; *The King v. Anderson*, 2 East, P. C. 772.

The COURT (*nem. con.*) discharged the prisoner on the ground of the want of a seal, and the informality of the warrant, and did not recommit him, because there was no evidence that he had committed any offence in the District of Columbia.

The prisoner was afterwards arrested again and committed upon a charge of stealing lottery tickets and a penknife, from B. O. Tyler, in this county, and was again brought before the Court by *habeas corpus*, when *Mr. C. C. Lee* and *Mr. Jones*, for the prisoner, contended that although the commitment be perfectly regular and formal, and states that the party is charged on oath with an offence for which the committing magistrate has a right to commit, the Court can and will rehear the case and revise his judgment. 3 Bac. Ab., Hab. Corp. 438, B. No. 13; 1 Chitty, Crim. Law, 113; Cald. 295; 1 Leach, 270; 4 Chitty, 123, &c.; *Ex parte Bollman & Swartwout*, 4 Cranch, 114; *Commonwealth v. Hollomay*, 5 Binney, 512; *Elizabeth Claxton's case*, 12 Mod. 566.

The COURT, on the next day, which was the last day of the term, decided, (THRUSTON, J., dissenting and wishing further time to consider the question,) that they would examine the witnesses, as they were all present; but said that they would not consider themselves bound by this case as a precedent.

After examining the witnesses the Court ordered the prisoner to find bail in \$500, and upon his refusal, the prisoner was remanded.

NOTE. In this case, CRANCH, C. J., and MORSELL, J., were disposed to lay down the rule of proceedings upon *habeas corpus*, as follows: (but as THRUSTON, J., wished for further time for consideration they did not give the opinion in public,) namely,

Upon the return of the *habeas corpus*, if the commitment be in all respects regular and formal, and for an offence for which the committing magistrate had authority to commit, the Court will, upon the request of the prisoner, issue a *certiorari* to certify the informations, examinations, and depositions taken by and remaining with the committing magistrate, in relation to such commitment; and if none such shall have been taken, will sum-

mon him to appear and state upon oath the evidence upon which he granted the warrant of commitment; and upon ascertaining such evidence, will consider the same, and thereupon proceed to discharge, bail, or remand the prisoner, as the magistrate ought to have done; unless the prisoner shall require that the witnesses shall be reëxamined by the Court; in which case they will order the witnesses to be summoned, and remand the prisoner until such witnesses can be had.

If the commitment be so bad upon its face that the Court must discharge the prisoner from that commitment, the Court will, if they have sufficient evidence before them, commit the prisoner *de novo*, and order the witnesses to recognize for their appearance, at the proper time and place, to testify on behalf of the United States.

If the witnesses, upon whose testimony the prisoner was committed by the magistrate, cannot be had immediately, and the prisoner will not consent that their testimony shall be stated by the magistrate, and that the Court shall proceed to act upon such statement as if the witnesses were present and had testified before the Court, or if the committing magistrate be dead, the Court will remand the prisoner for further examination until the testimony of the witnesses can be had.

THE FARMERS AND MECHANICS BANK OF GEORGETOWN v. JAMES MELVIN *et al.*

In allowing claims against a trust-fund, as between contending creditors, a claim upon a judgment of more than twelve years' standing must be rejected without pleading the statute of limitations, as there was no time when the debtor, or his administrator, could plead it.

UPON exception to the report of the auditor who had allowed a claim of Cruikshank upon a trust-fund, it appeared that the claim was upon a judgment of more than twelve years' standing.

Mr. J. Dunlop, for the other creditors, contended, that, by the Maryland Statute of Limitations, 1715, c. 23, § 6, this judgment cannot be given in evidence, and is *primâ facie* of no effect.

Mr. Marbury, *contrâ*, contended that the creditors cannot take that exception, as *non constat*, that Mr. Melvin, the administrator of the debtor, would plead the statute; and the Court has decided that it must be pleaded.

But the COURT (MORSELL, J., not sitting,) decided that as there was no time when the administrator could plead it, and as the act is peremptory, the judgment must be taken, *primâ facie*, to be void; and rejected the claim.

STEWART v. J. K. SMITH *et al.*

A decree *nisi*, upon default of appearance and answer to a bill in chancery, does not become absolute until the end of "the term next succeeding that to which the decree shall be returned 'executed.'"

THE bill in this cause, was taken for confessed, for want of appearance and answer within three months after filing the bill, according to the 6th rule of the rules of chancery practice, prescribed by the Supreme Court of the United States for the Circuit Courts; and an interlocutory decree was passed for a sale of the property, and at the end of the decree it was stated that it would be final, "unless cause shown by the end of the next term thereafter." No cause being shown at that term, a sale was made and reported to the Court, and the plaintiff obtained an order of ratification, unless cause to the contrary should be shown by a certain day.

Mr. Redin now moved to set aside the sale, because it was made before the expiration of the term next succeeding that to which the decree was returned executed, agreeably to the 6th rule of chancery practice ordered by the Supreme Court of the United States, to be observed by the Circuit Courts, by which it is ordered that, "If the defendant shall not appear and file his answer within three months after the day of appearance, and after the bill shall have been filed, the plaintiff may proceed to take his bill for confessed, and the matter thereof shall be decreed accordingly; which decree shall be absolute, unless cause be shown at the term next succeeding that to which the decree shall be returned executed."

Mr. Jones, contrâ.

THE COURT (*nem. con.*) ordered the sale to be set aside, because the decree *nisi*, notwithstanding the clause in it stating that it should be final *nisi* the end of the term then next succeeding, did not become absolute until after the sale had been made. Having adopted, as general rules of practice in this Court, the rules prescribed by the Supreme Court of the United States, this Court is bound by them, and the defendants had a right to appear according to those rules.

UNITED STATES, for the use of Barrett, v. J. W. BAKER, Administrator of Smallwood.

If a deed of land be set aside, in equity, after the death of the purchaser and of his widow, on account of his fraud, and the purchase-money be decreed to be repaid

by the heirs of the vendor to the administrator of the purchaser, to be by him distributed as assets, the widow's second husband is entitled, as distributee, to his deceased wife's third of the purchase-money thus repaid.

THIS was an action of debt upon the defendant's administration-bond, in which Barrett seeks to recover, in right of his deceased wife, (who, before her marriage with him, was the widow of Walter B. Smallwood,) one third part of \$1,330.35, which came to the defendant's hands, under the following circumstances.

On the 23d of June, 1806, W. B. Smallwood purchased of Addison Murdoch fifty-two acres of land, and paid therefor \$1,176.93, and took possession. In 1810 or 1811, Smallwood died, leaving four children and a widow, who became administratrix and guardian of the children. In 1811 or 1812, the widow intermarried with Barrett, the plaintiff. Murdoch having also died, his heir at law, some years after the death of both Murdoch and Smallwood, filed a bill against Smallwood's heirs to set aside the purchase of the land, on the ground of the incapacity of Murdoch to contract. An issue out of chancery was ordered, to ascertain the fact whether the said contract was obtained by fraud on the part of Smallwood. The jury found a verdict for the heirs of Murdoch, Mrs. Barrett, the widow of Smallwood, being then alive. She died on the 8th of May, 1819, before any decree was passed in the cause. In November of the same year, the defendant was appointed administrator *de bonis non*, of Smallwood, and guardian of his children. On the 11th of January, 1822, the Court decreed that the purchase should be set aside, and that the purchase-money should be repaid by Murdoch's heirs to Smallwood's administrator, to be by him distributed as assets of Smallwood's estate. There are no debts of Smallwood.

A verdict for the plaintiff was rendered, by consent, subject to the opinion of the Court, upon the case thus stated.

Mr. R. P. Dunlop, for the plaintiff, contended that Smallwood's widow was entitled, as distributee, to one third of the assets of Smallwood's estate, after payment of debts. That upon her death, her husband, Barrett, was, by the Act of Maryland, vested with all her personal rights, or choses in action; and as, by the decree of the Court, the money refunded by Murdoch's heirs, to Smallwood's administrator, is to be distributed as assets, he is, in right of his wife, entitled to one third. See Maryland Testamentary Law, 1793, c. 101, ch. 5, §§ 8 and 9; 2 Bl. Com. 435; *Whitaker v. Whitaker*, 6 Johns. 112, 117.

Mr. Redin, contra, contended, that, in equity, at the time of the death of the wife, this was land, (and not personal estate,) and descended to the heir at law, and that the wife had no right which could survive to her personal representative. She died

before the land was converted into money. It was no part of her former husband's personal estate. He cited 2 Com. Dig. 617, Fraud, 3, M. 7; *Eastabrook v. Scott*, 3 Ves. 461; *Watt v. Watt*, Id. 244; 1 Fonbl. 139; 2 Com. Dig. 208, Baron and Feme, E. 2 and 210, E. 3; Co. Lit. 351 a; 2 Bl. Com. 433; Maryland Law, 1798, c. 101, ch. 5, § 8; *Garrick v. Camden*, 14 Ves. 372; *Anderson v. Dawson*, 15 Id. 531; *Bayley v. Wright*, 18 Id. 49.

CRANCH, C. J., after stating the case, delivered the opinion of the Court.

The question is, whether Barrett is entitled to a third of that sum, (\$1,330.35,) in right of his late wife, the widow of Smallwood, she being dead at the time it was decreed to be returned for distribution; or whether the children of Smallwood are entitled to the whole.

By the terms of the decree, this money is to be distributed as assets of Smallwood's estate.

The rights of the distributees of that estate vested at the moment of his death. His widow was then entitled to one third of his personal estate, after payment of the debts. If she died before distribution, her administrator (and, by the law of Maryland, her husband stands in the place of her administrator,) became entitled to her share of the estate. It is unimportant whether or not the administrator of her husband had collected all the debts due to his estate, before her death.

It has been said, in argument, that this money was not a part of her husband's estate, either during his or her life, or at the time of his death. This, however, is immaterial, because the Court has decreed that it shall be distributed as assets of his estate. And the only question is, how would the assets of his estate now be distributed? Unquestionably, as they would have been on the day of his death, when the rights of the distributees accrued.

If any distributee is dead, his or her share goes to the personal representative of such distributee.

We are of opinion that Mr. Barrett is entitled to his wife's share of the money.

Judgment for the plaintiff.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1825, AT ALEXANDRIA.

ALEXANDER SIMMES *v.* MARINE INSURANCE COMPANY OF ALEXANDRIA.

A person, for whose use a vessel worth \$3,000 or \$4,000 was built, and who held the builders' bond of conveyance of the same, upon the payment of \$1,260, and who had the entire possession and use of the vessel, had an insurable interest in the freight, and truly represented himself to the underwriters as the owner of the vessel, although the register was in the name of the builder, and that fact not disclosed to the underwriters at the time of executing the policy.

Upon an open policy from St. Thomas to Havana, it was not necessary to disclose the fact that the vessel had sailed from Alexandria to Buenos Ayres, where a part of the cargo was discharged, and thence to St. Thomas.

The owner of a vessel is entitled to reasonable freight only, unless he shows an express contract for a specific sum, or price.

The bill of lading was not conclusive evidence of such a contract.

The bond of conveyance of the vessel, by the builder, to the plaintiff, was not conclusive evidence that the ownership, so far as the freight was concerned, was in the builder at the time of the insurance.

It was no valid objection to the plaintiff's recovering freight from the Danish Island, St. Thomas, to the Spanish colony, Havana, that the vessel had been chartered at Buenos Ayres, then in a state of revolt against Spain, by Danish subjects, resident at St. Thomas, for a voyage from Buenos Ayres to Havana, with leave to stop at St. Thomas, where she did stop and changed her papers, and took a new bill of lading without unloading the cargo.

This was an action upon an open policy on freight of the schooner Eleanor Simmes, from St. Thomas to Havana, amounting to \$3,100. The vessel was lost near Havana.

Mr. Hewitt and Mr. Key, for the plaintiff.

Mr. Taylor and Mr. Swann, for the defendant.

The facts of the case appeared to be, that the vessel was built by one Levin Stewart, for the plaintiff, who was master of the vessel, and who had her rigged at his expense. That she was delivered to the plaintiff by Stewart, who registered her in his own name, and gave the plaintiff a bond to convey her to him upon the payment of the balance due for the building of her, amounting to \$1,260. The value of the vessel being between \$3,000 and \$4,000. The application for insurance called her the Eleanor Simmes, Alexander Simmes, master and owner.

Mr. Swann, for the defendants, moved the Court to instruct the jury, that the plaintiff had shown no insurable interest in the freight; but that if he had, the nature of his interest ought to have been disclosed. He contended that freight cannot be insured as freight by any person who is not the owner of the vessel, unless the nature of the plaintiff's claim for freight be disclosed to the underwriters at the time of executing the policy. That the plaintiff had no insurable interest in the freight, until he had paid the \$1,260. *Riley v. Delafield*, 7 Johns. 522; *Camden v. Anderson*, Marshall, 91, Portland Ed.

Mr. Taylor, on the same side, contended that the plaintiff should also have disclosed the previous voyage from Buenos Ayres to St. Thomas. *Murdock v. Potts*, Marshall, 230.

Mr. Key, contra. The ownership may be proved by circumstantial evidence, and we have a right to contend before the jury, that the plaintiff is the owner notwithstanding the register is in the name of Stewart. Both Simmes and Stewart had an insurable interest in the vessel. She was worth \$4,000, and only \$1,260 were due to Stewart. Simmes rigged her at his expense, and fitted her out. Stewart must be considered as a mere mortgagee. He had an interest in the vessel to the extent of his \$1,260, and no further. All the earnings of the vessel belonged to Simmes. He had the whole use of the vessel. Stewart could not have claimed the freight from the consignees.

The fact that a part of the cargo was taken in at Buenos Ayres, does not affect the plaintiff's right to freight from St. Thomas to Havana. The courts of one nation do not enforce the revenue laws of another nation.

The COURT refused to give the instruction, as prayed, but instructed the jury, in effect, that if they should be satisfied by the evidence that Levin Stewart only retained the legal title as his security for \$1,260, and permitted the plaintiff to take possession of the vessel, and use it for his own benefit, and that the plaintiff rigged, fitted out, and furnished the said vessel at his own expense, for the voyage mentioned in the policy, and that the vessel was built for and sold to the plaintiff; then the plaintiff had an insurable interest in the freight, and the representation made by the plaintiff's agent to the underwriters was a sufficient disclosure of his interest.

The defendants' counsel then prayed the Court to instruct the jury that the plaintiff could only recover a reasonable compensation for the freight.

The COURT refused to give the instruction as prayed, but gave it with this qualification, to wit, unless the plaintiff should prove an express contract for a specific sum, fairly made; and that the bill

McClean's Executors v. Miller.

of lading, although permitted by the defendants to be read in evidence, is not conclusive evidence of such a contract.

The Court also refused the defendants' prayer to instruct the jury, that the bond of conveyance of the vessel from Stewart to Simmes was conclusive evidence of the ownership being in Stewart, and that Simmes had not an insurable interest in the freight as owner, as represented in the written order for insurance.

The Court also refused the defendants' prayer to instruct the jury, that if they should find from the evidence, that the vessel was chartered at Buenos Ayres, by the agent of Burgurt and Ullhorn, Danish subjects, resident in the Danish Island of St. Thomas, for a voyage thence to Havana, with leave to touch at St. Thomas, where her cargo, after touching there, was not taken out; that Buenos Ayres was in a state of revolt against Spain, but claiming to be independent, and that Havana was in subjection to Spain; that her papers were changed at St. Thomas, and the bill of lading there signed, the voyage was illegal, and the plaintiff cannot recover upon this policy.

The verdict was for the plaintiff.

Bills of exception were taken, but no writ of error.

UNITED STATES v. JOHN CLARK, a Slave.

In Alexandria county, a slave guilty of manslaughter, was punished by burning in the hand and whipping with ten stripes.

THE defendant, who was a slave about thirteen years old, was indicted for the murder of another slave, named Burdet, about fifteen years old.

The deceased was larger and stronger than the defendant, and struck him several times, till the latter drew a knife and told the deceased that if he did not leave striking him, he would stab him; the deceased continued to strike him, and he stabbed the deceased in the left breast, of which wound he died instantly.

The jury found him guilty of manslaughter, and the Court sentenced him to be burnt in the hand, and whipped with ten stripes.

DANIEL MCCLEAN'S EXECUTORS v. MORDECAI MILLER.

Upon the dissolution of a mercantile firm, if it be agreed that the acting partner shall take the effects and pay all the debts of the firm, and this be known to the creditor of the firm, he cannot, with a good conscience, take a lien on the joint effects for

McClellan's Executors v. Miller.

new advances made by him to the acting partner on his own individual account, so as to exhaust the joint effects, and leave the retiring partner liable for the old joint debt.

THIS was a bill in equity, filed on the 31st of January, 1818, by Daniel McClellan, in his lifetime, to enjoin proceedings on a judgment at law obtained against him by the defendant, Mordecai Miller, for \$259.55, with interest from the 1st of July, 1816, and costs. An injunction was granted by one of the judges in vacation, and upon the filing of the answer, and upon hearing a motion to dissolve the injunction, the Court refused to dissolve it, and continued it until final hearing, and the cause was returned to the rules for further proceedings. At April term, 1819, it was set for hearing on bill, answer, and exhibits, and at April term, 1820, the Court decreed a perpetual injunction, but on the defendant's motion gave him leave to move at the next term for a reconsideration of the cause. At November term, 1820, the Court ordered the decree to be set aside, the cause to be redocketed, and leave to both parties to take depositions. At the May term, 1823, the complainant's death was suggested, and his executors, Norman R. Fitzhugh and Jacob Douglass, were made parties. At November term, 1825, the cause came on to be heard on the bill, answer, general replication, and depositions, and

The COURT decreed a perpetual injunction.

CRANCH, C. J., delivered the opinion of the Court:—

By the terms of the dissolution of the partnership between Cawood and McClellan, the whole joint effects were transferred to Cawood, who undertook to pay the joint debts. These facts were known, at the time, by the defendant, Miller, who then had a joint claim against the copartners. With this knowledge he could not, with a good conscience, collude with Cawood, in applying the joint funds to a new debt contracted with Cawood, leaving McClellan liable to pay the joint debt out of his separate estate. He knew that McClellan had deposited those funds in the hands of Cawood, to pay the joint debt, and that Cawood had undertaken so to apply them. If the joint funds were transferred to Cawood, so was the debt. Mr. Miller had no right to separate them. The same act, which made Cawood master of the funds, made him debtor for the debt. It is like a trust. A party obtaining possession of the trust-fund, with a knowledge of the trust, is bound to see it executed to the extent of the funds which come to his hands. If Mr. Miller, knowing the facts, took the funds as security for new advances made to Cawood, it was so far to be considered in equity, as a fraud upon McClellan, as to postpone his (Mr. Miller's) security upon the new contract with Cawood, to that upon his old claim against Cawood and McClellan.

Miller & Son v. Hooe and Janney.

This is the view which the Court has always taken of the case, and there is nothing in the affidavit or deposition of Cawood, to which the attention of the Court was called at the last term, to vary that view. Mr. Miller, in his answer, fully admits his knowledge of the terms of the dissolution, as they are alleged in the bill. That knowledge is decisive of the case.

Independent, however, of that view of the subject, the account rendered by Mr. Miller to Mr. McClean, and exhibited with the bill, shows (when the several items are arranged according to the natural order of their dates,) that the joint debt was paid. It appears that on the 5th of April, 1816, Mr. Miller had received from the joint funds, more than enough to discharge the whole of his joint claim against Daniel Cawood & Co., and of his separate claim against Daniel Cawood; so that the joint debt was in fact paid.

It is not, however, necessary to reply on this ground, as we consider the former view of the case conclusive against the defendant.

The former decree of the Court, perpetuating the injunction, must stand confirmed.

The COURT (THRUSTON, J., absent,) decreed a perpetual injunction.

MORDECAI MILLER & SON v. JOHN HOOE AND JONATHAN JANNEY.

Upon a chancery attachment in Alexandria county, District of Columbia, against the effects of an absent debtor, the garnishee, residing in Alexandria county, is not liable to the plaintiff for goods of the defendant which are in the garnishee's custody in Virginia, where the debtor himself resides.

If the resident garnishee is not indebted to the defendant, and has no effects of the defendant in his possession in this district, and the defendant himself is not found in the county of Alexandria, no decree can be rendered against either the garnishee or the debtor, and the bill must be dismissed, as this Court has no jurisdiction in the case.

THIS was a chancery attachment in the county of Alexandria, District of Columbia, to attach the effects of John Hooe, a resident of Virginia, in the hands of Jonathan Janney, a resident of the county of Alexandria, for a debt due by Hooe to Mordecai Miller & Son, of Alexandria. The *subpoena* was served upon Janney on the 3d of April, 1824.

The garnishee, Janney, answered that he was not indebted to Hooe at the time of service of the attachment, or at any time afterwards, but that Hooe was indebted to him at the time of the service of the attachment in the sum of \$587. That Hooe has his crop of wheat ground at Janney's mill in Virginia, which was

Balderston v. Manro.

under the immediate direction and management of one John P. Smoot, who was authorized to give receipts for flour brought to the mill, and to deliver the flour to the respective owners. That Hooe agreed that Janney should retain as much of his flour as would satisfy and discharge the debt to Janney. That after he had retained enough flour for that purpose, there remained more than enough to pay the debt due to Mordecai Miller & Son, the complainants, but Hooe sold it to one George Johnson, to whom it was delivered after the service of the *subpœna* upon Janney, who, as the property was out of the jurisdiction of this Court, did not think himself justified in withholding it from Mr. Johnson, who had purchased it. He denies all fraud and collusion, &c.

The COURT (THRUSTON, J., absent,) was of opinion, that as the garnishee was not indebted to the defendant Hooe, and had not any effects of that defendant in his hands within the jurisdiction of this Court, no decree could be made against either of the defendants, and ordered the bill to be dismissed.

ELY BALDERSTON v. JONATHAN MANRO *et al.*

The assignment and delivery of a bill of lading and invoice of goods *in transitu*, for a valuable consideration, conveys the legal title; and the goods cannot be attached as the property of the assignor.

THIS was a chancery attachment of the effects of Jonathan Manro, of Baltimore, in the hands of George F. Warfield and Fielder Luckett, by Ely Balderston, a creditor of Manro.

It appeared that Manro, residing in Baltimore, and being largely indebted to sundry persons, on the 1st of March, 1823, made a deed of assignment of his property to the defendant, George F. Warfield, also of Baltimore, in trust for the payment of the creditors named in the deed, of whom the plaintiff was not one. This deed was duly acknowledged and recorded according to the laws of Maryland, and among other things assigned and transferred to the said trustee all the right of the said Manro to the returns, net proceeds, profits, and property in and to thirty-two bags of cocoa on board the brig Resolution; and for the better transferring the same to the said trustee, indorsed and assigned to him on the same 1st of March, 1823, the bill of lading and invoice thereof.

It appeared also by the defendant's answer, that the trustee had lent his notes to Manro to the amount of \$4,000 or \$5,000 for which the trustee was liable, and he claimed a right to retain any surplus which might remain in his hands after paying the credit-

Balderston v. Manro.

ors named in the deed, to indemnify himself against that liability. The attachment was not issued until the 11th of March, 1823, ten days after the assignment and indorsement of the bill of lading to the defendant.

Mr. C. C. Lee, for the plaintiff.

Mr. Taylor, for the defendant.

The COURT (THRUSTON, J., absent,) was of opinion, that the assignment and indorsement of the bill of lading of the thirty-two bags of cocoa, transferred the legal title to Warfield, and that the Court could not deprive him of that legal title, if his equity was equal to that of the plaintiff. Warfield is responsible for Manro to the amount of \$4,000 or \$5,000, and he is doubtful whether his other security is sufficient to indemnify him. If there should be a surplus of the trust-funds in his hands, after paying the trust-debts, he will have a right in equity to retain enough to secure an indemnification. It does not yet appear what that surplus, if any, will be; nor whether the other security, which he holds, is sufficient. Under such circumstances, a court of equity will not oblige him to relinquish that surplus, unless the plaintiff will indemnify him.

We think that Mr. Warfield ought to take measures to obtain payment of the notes (for which he is responsible,) out of the funds pledged to the bank; and to settle the trust-debts, so as to ascertain what he will have to pay to the bank upon his indorsements, and what surplus there may be of the trust-fund; and that the cause should stand continued until he shall state such an account; and that the marshal pay into Court the net proceeds of the sales of the cocoa, and that they be invested in some productive fund, until the Court can make a final decree in the cause.

NOTE. At April term, 1826, the Court ordered the bill to be dismissed with costs; and ordered the marshal to pay to Warfield the net proceeds of the sales of the cocoa.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1825, AT WASHINGTON.

YOUNG *v.* PALMER.

In an action upon the case for selling negroes out of the neighborhood contrary to agreement, the defendant will not be held to special bail, upon an affidavit stating the breach of the agreement, and the belief of the plaintiff that he has sustained damage to a certain amount.

THIS was an action upon the case upon a special contract of sale of slaves by the plaintiff to the defendant, in which the defendant promised not to sell them out of the neighborhood, &c., whereby the plaintiff was induced to sell them for less money; but the defendant sold them, &c., contrary to his agreement.

The affidavit stated that the plaintiff "believes" he could have sold them for four hundred dollars more than he got for them from the defendant if he had sold them unconditionally, and "considers" that he has sustained damage in the sum of four hundred dollars.

The COURT (THRUSTON, J. doubting,) permitted the defendant to appear without special bail.

COYLE *v.* GOZZLER.

A note payable in sixty days "with interest from date," will not support a declaration upon a note payable in sixty days without interest.

If an intermediate indorsement is averred in the declaration it must be proved at the trial although the suit is brought for the use of such intermediate indorser.

If the notary-public has no memorandum, nor recollection of the day of demand and notice, but has a memorandum in his book that demand was made and notice given to the indorsers, and testifies that it was his universal practice to make the demand and give notice on the day after the last day of grace, such testimony is competent evidence for the consideration of the jury.

A special custom of the banks and merchants of the county of Washington, to demand payment on the day after the last day of grace, may be given in evidence without being averred in the declaration.

ASSUMPSIT, against the indorser of Stull and Williams's note at sixty days, dated 21 October, 1816.

Mr. J. Dunlop, for the defendant, at the trial at May term,

Magruder's Case.

1825, objected to the note offered in evidence by the plaintiff, because it had the words, "with interest from date," which words were not in the note described in the declaration; and he contended also that the handwriting of the intermediate indorsement must be proved; as the indorsement was averred in the declaration. He also objected that the testimony of Mr. R. Johns, the notary-public, was not competent to go to the jury. Mr. Johns testified that he did not then recollect, nor had he any minute in his book, of the time when he gave notice to the indorser; but it contains a memorandum that notice was given to the indorsers, as well as a memorandum of the demand. And he further testified that it was his universal practice to give notice on the day on which he made the demand, which was on the 24th of December, which was the day after the last day of grace; and that he believes he gave the notice on that day.

The COURT decided that his testimony was competent evidence for the consideration of the jury. That as the declaration averred an intermediate indorsement, it must be proved, although it was proved that the indorsement was made after the note had become payable, and that the suit was brought for the use of that intermediate indorser; and that the variance between the note produced in evidence and that described in the declaration, was fatal, as it could not be given in evidence upon that declaration.

A juror was then withdrawn and the plaintiff had leave to amend; and the cause was continued, without costs. MORSELL, J., dissenting as to the continuance.

The cause came on again for trial at the present term, when Mr. Ashton, for the plaintiff, offered evidence of the particular custom of the banks and merchants in the county of Washington, to demand payment of the maker, and to protest and give notice to the indorsers, on the day after the last day of grace.

Mr. Key, for the defendant, objected to such evidence, because there was not, in the declaration any averment of such a custom, and referred the Court to the case of *Renner v. Bank of Columbia*, in the Supreme Court of the United States, 9 Wheat. 581.

The COURT (THRUSTON, J., absent,) permitted the evidence to be given. The declaration stated the demand and notice to have been made and given on the 24th of December, 1816, which was the day after the last day of grace.

MARY ANN MAGRUDER'S CASE.

If the administratrix of her deceased husband sell the goods and take notes payable to herself personally, bring suit on one of the notes, and die, and her administrator

Patriotic Bank v. Little.

enter his appearance in the suit and obtain judgment the Court will not order the judgment to be entered upon the docket for the use of the administrator *de bonis non* of her husband, unless he can show that the sureties of the administratrix are insolvent, and that the balance of her administration account is against her.

MARY ANN MAGRUDER, administratrix of Thomas Magruder, sold the goods of her intestate and took notes payable to herself personally. She brought suit upon one of the notes and died before judgment. Her administrator entered his appearance in the suit and obtained judgment.

The administrator *de bonis non* on her husband's estate moved the Court to order the judgment to be entered upon the docket for his use.

Mr. Key, contra. She has given an administration-bond with sureties who are liable for this money. She may have paid debts upon the faith of these notes. She is liable upon her bonds only for the balance of funds which come to her hands. It is better for her husband's estate because her sureties are directly and immediately liable for the money, whether it be recovered from the defendant or not.

Mr. Jones, for the administrator *de bonis non*.

The administrator *de bonis non* has shown his title in equity to this money. To rebut this the administrator of Mrs. Magruder must show that she has paid debts to this amount, or that she has fully administered all that came to her hands. If the debtor be insolvent and she has used due diligence, she would not be liable for this fund.

The COURT (THRUSTON, J. absent,) said they would not deprive the legal plaintiff (the administrator of Mrs. Magruder,) of his legal right, unless the administrator *de bonis non* could show that the sureties of Mrs. M. were insolvent, and that the balance of her administration account was against her.

PATRIOTIC BANK v. ISRAEL LITTLE.

If a promissory note, with a blank indorsement be put into the hands of an attorney for collection, and he die, and the note cannot be found after diligent search among his papers, secondary evidence may be given of the contents of the note.

ASSUMPSIT, against the maker of a promissory note.

The plaintiff proved that the note with a blank indorsement, was, after it was payable, put into the hands of Mr. Law, the plaintiff's attorney, for collection; that Mr. Law died, and the note, after diligent search among his papers, could not be found.

Mr. Morfit and *Mr. Key*, for the defendant, objected to the

 Paul v. Lowry.

admission of secondary evidence of the contents of the note, and cited *Poole v. Smith*, Holt & Starkie, Rep. 55; *Miller v. Race*, 1 Burr. 452; *Lawson v. Weston*, 4 Esp. 56; *Pierson v. Hutchinson*, 2 Camp. 211; *Ex parte Greenway*, 6 Ves. 812; *Hart v. King*, 12 Mod. 310; *Davis v. Dodd*, 4 Taunt. 602; *Wright v. Hancock*, 3 Mun. 521; and Esp. on Evidence.

Mr. Wallach, *contra*, cited 1 Holt, N. P. 144; 3 Compton, 324; *Williams v. Clements*, 1 Taunt. 523; *Dangerfield v. Wilby*, 4 Esp. 159; *Brown et al. v. Messiter*, 3 M. & S. 281; *Anderson v. Robson*, 2 Bay, 495; *Meyer v. Barker*, 6 Binney, 228, 234, 237, 238; *Renner v. Bank of Columbia*, 9 Wheat. 581.

The COURT (CRANCH, C. J., hesitating,) permitted the secondary evidence to be given.

 PAUL v. LOWRY.

A deposition taken before the mayor of a city, who usually certifies his acts under his official seal, must be so certified; or his authority otherwise proved; which, it seems, may be done by parol.

Mr. R. P. Dunlop, for the plaintiff, offered in evidence a deposition, taken under the Act of Congress, before a person who certifies himself to be mayor of Petersburg, but who did not affix his official seal to his certificate, nor was there any other evidence of his being mayor. *Mr. Dunlop*, cited the cases of *Dunlop v. Munroe*, in this Court, at June term, 1809, (1 Cranch, C. C. 536,) and *Lindsay v. Riggs et al.* at December term, 1811, MS. (not reported as to this point,) when a deposition purporting to be taken before the superintendent of the city of Charleston, certified under the seal of the corporation, and taken in due form under the Act of Congress, was permitted by the Court to be read in evidence, without other proof of the fact that he was the chief magistrate of the city, than his own certificate and his official seal; but before *Mr. Key*, the plaintiff's counsel read the deposition, he proved, by the testimony of *Mr. Cheves*, that before whom the deposition was taken, was the intendant and chief magistrate of the city of Charleston, at the date of the certificate, and that he believed it was the seal of the corporation, but did not know his handwriting.

The COURT (*nem. con.*) having looked into all the cases respecting the admission of depositions taken under the Act of Congress, of which any note had been taken in this Court, rejected the deposition, stating that where the officer taking the deposition has an official seal, and usually certifies his acts under that seal, his

Union Bank v. Eliason.

certificate, (not accompanied by his official seal,) that he is such officer is not sufficient; but intimated that the fact, that he is such officer, may be proved by parol testimony, as any other matter *in pais*.

UNION BANK v. ELIASON.

The statute of limitations must be pleaded strictly within the rule-day, unless the Court, for good cause shown, shall permit it to be pleaded afterwards.

Ignorance of the practice of the Court may be an excuse for an attorney recently admitted to the bar, which, with other circumstances, may be good cause for admitting the statute to be pleaded after the rule-day.

ASSUMPSIT. The plea of limitations was filed after the rule-day.

Mr. Dunlop, counsel for the plaintiffs, had instructed the clerk not to make up an issue on that plea; but, under the general practice of the bar to suffer the clerk to enter the pleadings and make up the issues, it is probable that inadvertently he made the entry on the docket, "*non ass't., lim's. and issue.*"

Mr. Key, for the plaintiffs, now moved the Court to strike out the plea of limitations.

Mr. Coxe, for the defendant, stated (his affidavit not being required by the plaintiff's counsel,) that he was employed by the defendant to appear for him at the return-term of the writ; which he did, and at the same time had a conversation with the defendant, in which it was determined between them that the statute of limitations ought to be pleaded. That he (*Mr. Coxe*,) had recently come to this bar, and never had heard that there was any rule of this Court, or of any other court, that required the plea of limitations to be filed before the expiration of the rule to plead.

Mr. Jones had also been employed as counsel, by the defendant, at the return-term, but was not consulted until after the plea-day.

The Court (*nem. con.*) ordered the plea of limitations to be stricken out. The Court was referred to the case of *Wetzell v. Bussard*, at October term, 1821, [*ante*, 252.]

Mr. Coxe, on a subsequent day, moved the Court to reinstate the plea of limitations, and produced the defendant's affidavit stating that the note on which the suit is brought is dated in 1814. That the defendant made a deed in trust to *Mr. Bowie*, to secure the bank, who took possession of the property, enjoyed the profits, and ordered the property to be sold by the trustee; bought it in, themselves, and hold it; and that it was worth more than the debt. That the plaintiffs never demanded of the defendant payment of the note after 1814, and that he had considered the debt as paid. This affidavit was in addition to the facts before stated by *Mr. Coxe*, on the motion to strike out the plea of limitations.

Mr. Dunlop and Mr. Key, contrà. If the defence stated in the affidavit be good it needs not the aid of the statute of limitations. The affidavit ought to state facts to show that the plea is necessary to the justice of the case, such as loss of evidence, &c.

Mr. Jones, in reply. The debt is paid in equity; and perhaps the defence cannot be sustained at law. The principle of the case of *Wetzell v. Bussard* applies to this. *Mr. Coxe* states that there is no rule of court as to the time of pleading the statute of limitations. The only rule is that pleas shall be filed by the rule-day. The practice of the Court was not known to *Mr. Coxe*, which requires that the plea of limitations must be filed strictly within the rule.

The COURT (THRUSTON, J., doubting but not dissenting,) said, It is within the discretion of the Court to admit or refuse any plea offered after the expiration of the rule to plead. The plaintiff has then, strictly, a right to judgment by default. This right is controlled only by the practice of the Court. By that practice, long established, all fair pleas to the merits have been admitted after the rule-day; but, by the same practice, the plea of the statute of limitations cannot be admitted, unless facts be stated showing it to be necessary to support the justice of the case, such as the loss of evidence, or some just defence of which the defendant is unable to avail himself at law, and the like; or unless some other good cause be shown to the Court for admitting the same.

In the case of *Wetzell v. Bussard*, at October term, 1821, in this Court, [*ante*, 252,] although there was an affidavit of merits, yet the Court relied principally upon the ground that the attorney for the defendant had been instructed, before the plea-day, to plead the statute of limitations; but it being the first term of that attorney's practice in this Court, and not being acquainted with the practice of this Court to require the plea of the statute of limitations to be filed before the expiration of the rule to plead, omitted to file it until the imparlance term after the plea-day.

In the present case, *Mr. Coxe*, the defendant's attorney, had, at the time he was employed by the defendant, been recently admitted to practice in this Court, and was as ignorant of the peculiar practice of the Court in regard to the statute of limitations as the attorney was in the case of *Wetzell v. Bussard*; and the affidavit of merits is perhaps as strong in this case as in that. The defendant had a right to plead the statute. He was in no personal default in not pleading it in due time. He has stated in his affidavit that he was ignorant of the practice to require the plea to be filed before the plea-day. If he should lose his case for want of the plea, it is doubtful, perhaps, whether, under the circumstances, he could make his attorney responsible for his loss.

Bank of Columbia v. Mackall.

We see no difference in principle between this case and that of *Wetzell v. Bussard*, and therefore think that the plea ought to be admitted.

BANK OF COLUMBIA v. LEONARD MACKALL.

The declarations of the notary's deputy cannot be given in evidence.

The defendant, who was a notary-public, was the indorser of a note for \$3,000, made by his son B. F. Mackall, who had conveyed to him, in trust, sufficient property for his indemnity. The note was payable in the plaintiff's bank, but no funds were there to pay it when payable. The note was, on the last day of grace, delivered to the defendant's son Brooke Mackall, who was his deputy-notary, with other notes, for demand and notice, and was returned to the bank with the other notes. The defendant afterwards sold the property, under the deed of trust, for stock in the plaintiff's bank, and offered it to the bank, at par, in payment of the note. But the bank refused to receive it; held that the jury may infer notice, or waiver of notice; but the delivery of the note to the deputy-notary, was not, *per se*, notice to the defendant.

The waiver of objection to the want of notice may be after the laches, as well as before.

ASSUMPSIT, against the indorser of B. F. Mackall's note for \$3,000, due 31st May, 1821, payable at the Bank of Columbia.

The defendant was the notary-public generally employed by the plaintiffs to demand payment of notes and give notice to the indorsers. His son, Brooke Mackall, was his deputy-notary, and transacted most of his notarial business. The defendant's note was delivered to his said deputy on the last day of grace, for demand and notice.

Mr. Key, for the plaintiffs, offered to give in evidence the declarations of the deputy-notary at the time he returned the note to the bank as to his giving notice to the defendant.

But the COURT (*nem. con.*) refused to permit them to be given in evidence.

Mr. Jones, for the defendant, prayed the Court to instruct the jury, that the plaintiffs could not recover upon the evidence, which consisted of the making and indorsement of the note; the delivery of the note on the third day of grace to the defendant's deputy (who was also his son and lived in his family) for demand and notice; a deed of trust by the maker of the note to the defendant, of sufficient property to indemnify him. The sale of the property by the defendant, for stock in the plaintiffs' bank, and his offer to pay the note in the said stock at par, which was not worth 30 per cent.; and the plaintiffs' refusal to accept it. When the note became payable, it was in the bank, and the officers of the bank were there ready to receive payment, but there were no funds of the maker there to pay it.

The COURT (*nem. con.*) refused to instruct the jury that the

Corporation of Washington v. Young's Administrator.

plaintiffs could not recover upon that evidence, and instructed them that if they believed the facts to be as stated, no other or further demand of payment was necessary to be made of the maker of the note; and that they might infer that due notice of the non-payment was given to the defendant, or that he had waived the objection arising from the want of notice.

Mr. Jones, then prayed the Court to instruct the jury, that it is necessary for the plaintiffs, in order to entitle themselves to recover in this action, to prove, in addition to the regular demand of payment of the said note at the said bank on the last day of grace, that the defendant was on that day, or the next, duly notified of the dishonor of the said note, and of the intention of the plaintiffs to hold him liable for the same as indorser; and further, that the delivery of the note to the deputy-notary for notice and protest (if such be found, by the jury, to be the fact,) was not, under the circumstances stated, notice to the defendant; but that it was still necessary, in order to charge the defendant, as such indorser, that he should have received, from his said deputy, actual notice of the dishonor of the said note, and of his being held liable for the same.

Whereupon the Court instructed the jury that the said delivery of the said note to the deputy of the notary as aforesaid, and under the circumstances aforesaid, was not, *per se*, notice to the defendant of the non-payment of the said note; and the Court refused to give the other part of the said instruction.

Mr. Jones then prayed the Court to instruct the jury, that in order to enable the plaintiffs to recover in this action, to prove such actual notice to the defendant; or that the defendant should, with a distinct knowledge of his right to require such notice, have, at the time of the said note being demanded, or before, waived such notice, and discharged the plaintiffs from the duty of giving the same.

Which instruction the Court refused to give; being of opinion, that it is competent for the plaintiffs to show that the defendant waived the objection arising from the want of notice, after laches of the plaintiffs had occurred; and that from the evidence aforesaid, the jury, if they should believe the same, may infer such waiver.

CORPORATION OF WASHINGTON, for the use of the holder of ticket No. 1037, v. MOSES YOUNG'S ADMINISTRATOR; and BRENT *et al.* v. GIDEON DAVIS.

The holders of tickets in the Washington lottery, have no right to sue the managers

Hyer v. Hyatt and Wilson.

upon the bond given by them to the Corporation of Washington, without the leave of the corporation; nor to sue the contractor for the lottery, on his bond given to the managers, without their consent.

THESE causes, in which the judgment of this Court had been reversed in the Supreme Court of the United States in January term, 1825, were sent down to this Court by mandate, setting aside the verdict and proceedings up to the declaration.

Mr. Jones, for the defendants, now moved this Court to dismiss these suits, according to intimation given in the opinion of the Supreme Court in 10 Wheat. 410, that Court having decided that the holders of the tickets had no right to use the names of the corporation and the managers without their leave. This motion is made in behalf of the Corporation of Washington and of the managers, as well as of Gideon Davis.

Mr. Key, contra. The bonds were given for the benefit of the public; and any person interested has a right to sue upon them. They are like the bonds of an auctioneer. As no objection was made until after verdict and judgment, and the causes have been carried up to the Supreme Court by writ of error, and sent down again by mandate, and no special order of the corporation to make this motion is shown, the assent of the corporation to the suits is to be presumed.

The COURT (THRUSTON, J., not having heard the argument, gave no opinion,) were of opinion, that the plaintiffs had a right to dismiss their suits, and ordered them to be dismissed.¹

HYER *et al.* v. HYATT AND WILSON.

In an action against two defendants, if one be taken and issue be joined, and plea waived and judgment confessed against him after the other has been taken, and before the cause is at issue against him; the judgment may be set aside for irregularity, and the two cases consolidated, and the issues made up and set for trial.

THIS was a joint action against Hyatt and Wilson. Hyatt was first taken. Afterwards, upon an *alias capias*, Wilson was taken, and while his case was standing on the imparlance-docket, judgment was confessed by Hyatt, and accepted by the plaintiff, by mistake, not being aware at the time, that Wilson had been taken.

Mr. Key and *Mr. Dunlop*, for the plaintiffs, now moved that the judgment against Hyatt should be set aside for irregularity,

¹ January 10, 1826. MORSELL, J., then left the bench, to attend his father, who was ill in Calvert County in Maryland.

Negro Letty and Child v. Lowe.

the continuance entered up, agreeably to the Act of Assembly of Maryland of November, 1787, c. 9, § 6, and the actions consolidated and set for trial.

Mr. Jones and Mr. Lee, contrâ.

The COURT (MORSELL, J., absent,) granted the motion.

NEGRO LETTY AND CHILD v. JOHN H. LOWE.

A female slave, purchased by the defendant at the request of the slave, to enable her to obtain her freedom by repayment of the purchase-money, is not entitled to judgment in her favor, until she has repaid the whole purchase-money; and if she had paid the whole purchase-money, *quere* whether she would be entitled to judgment in her favor, either at law or in equity, without a deed of emancipation.

PETITION FOR FREEDOM.

On the trial of this cause, Thomas Bingay, a witness for the petitioner, testified that he was present at the bargain between the defendant and Mary Greenfield, for the purchase of the petitioner, who was held by the said Mary Greenfield, as a slave for life, and was offered for sale by her mistress; that the price agreed upon to be paid by the defendant, was \$250. That the witness then took the defendant aside, and inquired of him what was his purpose and object in making the said purchase; to which he replied that he was about to make the said purchase from motives only of Christian charity, and to serve the said woman, of whom he had a good opinion, and whom he thought it his duty to serve; that he had confidence in her that she would repay him what he should advance, and that she should then be free. The witness told him if that was his object in making the said purchase, he would, if he desired it, be security for Letty for \$50; that she would pay up, in small sums, what he might advance; and that he would, moreover, put into his hands \$40 then, to enable him to make the first payment for Letty. The defendant declined requiring the security, saying he had confidence in the woman, but agreed to receive the \$10, which the witness thereupon paid him. The witness got the said \$40 from a colored woman, to whom Letty told him to apply for it, saying that it had been contributed by some friends of hers, for the purpose of enabling her to buy herself of her said mistress. That he would not have given the said \$40 to the defendant, but for his stating that he was making the purchase from the motives and for the purpose aforesaid. That after the said bargain, the defendant never claimed nor held the petitioner in his service; but that she lived at large, as a free woman, in the city of Washington, where the defendant also lived; and that after the

said bargain, and while so living at large, the child mentioned in the petition, was born. That the defendant after receiving the \$40, paid it to Mrs. Greenfield, but no information was given to her of the object of the defendant in making the said purchase. That this transaction took place some time in the year 1818, and at that time no bill of sale was executed, nor any receipt given for the money paid.

And the petitioner also produced and read in evidence the paper writings following, admitted to be signed by the defendant.

"Washington city. This is to certify that Letty Brown, the bearer of this, is my property; that I, in 1817 or 1818, purchased her from Miss Mary Greenfield, then her mistress. I further certify that I have received from her (Letty,) at sundry times, \$206, and that there is now due, on the purchase-money, &c., to me, \$64.94, on payment of which I hereby promise and bind myself that she (Letty) shall be free, her lifetime, from bondage to any person or persons. Given under my hand this 21st day of February, in the year 1823. John H. Lowe. Balance due and to be paid J. H. B., \$64.94."

"Washington city, 8th October, 1823, received from Letty, through the hands of Mr. Bingay, \$20, in part payment of the above claim. John H. Lowe."

"Received of Letty nine dollars. 5th February, 1825. J. H. Lowe."

The petition was filed on the 15th of July, 1825.

Upon this evidence, Mr. Jones, for the defendant, prayed the Court to instruct the jury that the petitioner was not entitled to recover; because,

1st. A slave is not competent in law to be a party to a binding contract.

2d. There can be no emancipation, but by deed, according to the provisions of the Maryland Act of 1796, c. 67, or by last will and testament.

3d. The whole purchase-money has not yet been repaid to the defendant.

Mr. Lear and Mr. Key, contrà. In the case of *Brown v. Wingard*, at April term, 1822, (*ante*, 300,) this Court only decided that there could not be a contract between the master and his slave, even in equity. But this is a contract between a slave and a third person. Here Mr. Lowe was only the trustee of the slave, and bought her only for her own use. The witness, Bingay, was also a trustee, and may enforce this contract.

It is not necessary, under the law of Maryland, that there should be a deed of manumission. Freedom may be obtained by implication. The defendant never had the right of property in the

Melvin v. Lackland.

slave, he was only trustee, and no deed of manumission was necessary from him. *Hall v. Mullen*, 5 Har. & Johns. 190.

The jury is to decide whether the whole purchase-money has been repaid to the defendant. In the case of *Crawford v. Cruse*, (not reported,) this Court decided that there was a remedy for the slave in equity.

Mr. Jones, in reply. In *Crawford v. Cruse*, this Court said there was a remedy in equity, consequently not at law. If the defendant never had the legal title, then the petitioner can have no right to freedom.

It is said that freedom may be gained by implication in a will; but there must be a will; and the whole question in *Hall v. Mullen*, was as to the true construction of the will; that is, whether the testator intended to give freedom to his slaves. But here is neither a will, nor a deed of emancipation.

There was no contract between Bingay and the defendant. He merely received the \$40 from Letty and gave it to the defendant.

This is a suit at law, and the petitioner must show a legal, consummate, title to freedom. In *Cruse v. Crawford*, the suit was in equity, upon a contract between persons competent to contract.

The COURT (MORSELL, J., absent,) could not agree to give the instruction. The defendant then demurred to the evidence.

At the next term, (May 1826,) The COURT (THRUSTON, J., *contrà*,) ordered judgment to be entered for the defendant upon the demurrer, without prejudice to any equitable relief which the petitioners might thereafter have.

MELVIN v. LACKLAND.

No paper can be read in evidence to the jury without the leave of the Court.

*Mr. Cox*e, for the defendant, offered to read a paper in evidence to the jury, to which the plaintiff's counsel objected.

The COURT (MORSELL, J., absent,) was divided in opinion upon its admissibility. The question then occurred as to the effect of this division of opinion, that is, whether the paper should be read or rejected.

The Court agreed, that no paper can be read in evidence to the jury, without the leave of the Court; and as the Court could not agree to admit it to be read, it must be considered as rejected. The paper was not read.

Semmes v. Sherburne.

RIGGS v. CHESTER.

If a cause be *non-prossed*, and not reinstated at the same term, it cannot be reinstated at a subsequent term, but is discontinued.

THIS cause was *non-prossed* at the last term, on the 19th of May, 1825, on a rule for security for costs. On the 25th of May, the defendant filed a plea of the statute of limitations. On the 26th, *Mr. Wallach*, the plaintiff's attorney, directed the clerk to enter him (*Mr. Wallach*) as security for costs, which was done upon the docket. No application was made to the Court at that term, to reinstate the cause. The clerk brought the case forward on the trial-docket of this term.

When the cause was called for trial, *Mr. Key*, for the defendant, objected that the cause was *non-prossed* at the last term, and not ordered by the Court to be reinstated; and that the Court could not reinstate it now.

And the COURT (*MORSELL*, J., absent,) being of that opinion, directed the clerk to strike it from the trial-docket, the cause not being continued from the last term.

 SEMMES v. SHERBURNE.

If the plaintiff's slave be hired to the defendant in the District of Columbia, who carries her to New Hampshire without the consent or authority of the plaintiff, by means whereof she is lost to the plaintiff, he may, in trover, recover the value of the slave. But if the plaintiff assented to the defendant's taking the slave to New England either before or after he took her, and she was lost without any negligence or omission of the defendant, the plaintiff is not entitled to recover.

In trover for a slave, the plaintiff cannot recover if he has obtained judgment against the defendant in a previous suit for the hire of the slave to a period subsequent to the commencement of the action of trover; but if, in making his claim for the hire of the slave, he did not mean to charge for the hire to a period later than the commencement of the action of trover, then such mistaken claim and the judgment thereon are not conclusive evidence against the plaintiff in the action of trover.

TROVER for a slave. This cause having come on to trial again upon the amended pleadings, [*ante*, 534.]

THE COURT, at the prayer of the plaintiff's counsel, instructed the jury, that if they believed from the evidence that the defendant, without the consent or authority of the plaintiff carried his female slave away to N. Hampshire and did not bring her back again and return her to the plaintiff, and that by reason of her being so carried away, the plaintiff has lost her, the plaintiff is entitled to recover the value of the slave. But at the prayer of the defendant, further instructed the jury that if they should find

from the evidence that the plaintiff had claimed and recovered judgment against the defendant for the hire of the slave up to a time subsequent to the institution of this suit, such claim and judgment are conclusive evidence of a waiver, by the plaintiff, of any unlawful conversion by the defendant prior to the commencement of this suit, and the plaintiff is not entitled to recover in this action.

But if the plaintiff, in making his claim for the hire of the slave, upon which he had recovered judgment, did not mean to charge for the hire of the slave to a period later than the commencement of this suit, then such mistaken claim so made by the plaintiff and the judgment thereon, are not conclusive against the plaintiff in this action.

The COURT further instructed the jury, at the prayer of the defendant, that if they should find from the evidence that the plaintiff assented to the taking of the slave to New England, either before or after the defendant took her, and that such slave was lost without any negligence or omission of the defendant, the plaintiff is not entitled to recover.

Mr. Key and *Mr. Morfit*, for the plaintiff.

Mr. Coxe, for the defendant.

Verdict for the plaintiff, \$360, and judgment.

CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1826, AT ALEXANDRIA.

MILBURN, Appellant, v. BURTON, Appellee.

A debt of \$50, upon which interest is due, cannot be recovered before a justice of the peace.

THIS was an appeal from a judgment rendered by a justice of the peace, upon a bond for \$100 penalty, with condition to pay \$50 on the first of February, 1820. The judgment was for \$50 to carry interest from the 1st of February, 1820, till paid, there being then more than five years' interest due.

Mr. Peyton, for the appellant.

Mr. Taylor, for the appellee.

THE COURT, (THRUSTON, J., absent,) said that it had been uniformly decided by this Court that the interest, as well as the principal, is part of "the matter in dispute;" and that if the principal and interest amount to more than \$50, a justice of the peace has no jurisdiction of the case.

Ex parte M. D. REARDON, on habeas corpus.

If a debtor who has been discharged under the Insolvent Act of the District of Columbia, be arrested upon a *ca. sa.* issued by a justice of the peace, for a debt accruing before his discharge, this Court may discharge him upon *habeas corpus*.

MATTHEW D. REARDON petitioned for a writ of *habeas corpus*, stating that he was in custody of a constable by virtue of a *ca. sa.* issued by Amos Alexander, Esq., a justice of the peace, upon a debt accruing before his discharge under the "Act for the relief of insolvent debtors within the District of Columbia," the tenth section of which provides that the Court before whom the process is returned or returnable, or any judge thereof, shall discharge the debtor in such case, but does not provide for a *habeas corpus*.

The execution in this case is returnable before a justice of the

Stump's Executors v. Deneale's Executrix.

peace on the third Monday of May, 1826; but he cannot issue a writ of *habeas corpus*. The judgment was rendered since the discharge.

The COURT (THRUSTON, J., absent,) decided that it had jurisdiction to discharge upon *habeas corpus*, under its general power to issue the writ and to inquire into the cause of commitment; and examined Mr. Alexander, the justice of the peace, as to the time when the cause of the action accrued; but the Court, not being satisfied that the cause of action accrued before the discharge under the insolvent act, refused to discharge the prisoner.

UNITED STATES v. NEGRO CALVIN and other Slaves.

This Court has not jurisdiction of riot, and assault and battery by slaves, in Alexandria county.

INDICTMENT for a riot, and assault and battery by slaves, on a constable.

Mr. Taylor, for the defendants' masters, moved to quash the indictment, because, by the law of Virginia, of 17 December, 1792, p. 187, § 11, it is enacted that "riots, routs, unlawful assemblies, trespasses, and seditious speeches by a slave or slaves, shall be punished with stripes at the discretion of a justice of the peace; and he who will, may apprehend and carry him, her, or them before such justice." This law was continued in force in the county of Alexandria by the Act of Congress of the 27th of February, 1801, [2 Stat. at Large, 103.] The common-law punishment of misdemeanors by fine and imprisonment is not applicable to slaves, who can have no property, and whose time and labor belong to their masters, so that imprisonment would be no punishment to them.

Mr. Swann, contra, for the United States. By the Act of the 27th of February, 1801, [2 Stat. at Large, 103,] this Court has cognizance of all crimes and offences. The jurisdiction of the justice may be concurrent.

The COURT (*nem. con.*) was of opinion that this Court has not jurisdiction; and that the indictment must be quashed, and the prisoners committed to take their trial before a justice of the peace.

STUMP'S EXECUTORS v. DENEALE'S EXECUTRIX.

The question whether the testator intended to charge his real estate with his debts, is to be decided by a careful consideration of the whole will.

Stump's Executors v. Deneale's Executrix.

The word estate will apply to real or personal estate, or to both, according to the manner in which it is used in reference to the respective clauses of the will.

The following clause of the will did not charge the real estate: "I am security for my brother James for two sums of money, for which I hold a deed of trust on his property, sufficient, I hope, to pay the same; and I do direct that my estate shall not be sold to pay those debts until the property so deeded, shall be sold, when my estate must be charged for any deficiency."

THIS was a bill in equity, by the executors of John Stump, against the heirs at law and executrix of George Deneale, to charge his real estate with the balance of a judgment at law, recovered by the plaintiffs against the testatrix, amounting to \$5,000, and interest and costs upon a contract in which the testator, George Deneale, was surety for his brother, James Deneale; the said sum being the balance due after deducting from the amount of the judgment the net proceeds of the sales of James Deneale's property, in Virginia, under a decree of a court of chancery, in that State, upon the deed of trust mentioned in the will of George Deneale.

All the material facts stated in the bill were admitted in the answer, and the principal question was, whether the real estate was, by the will, bound for this debt.

Mr. Hewitt and *Mr. Swann*, for the plaintiffs, relied upon the words of the will, "When my estate must be charged with the deficiency," and cited *Roberts on Wills*, 405.

Mr. Mason, for the defendants, contended, that, from the context and the whole tenor of the will, the word "estate," in that clause, must be confined to his personal estate, and cited *Lambert's Lessee v. Paine*, 3 Cranch, 133; "That this word, when coupled with things that are personal only, shall be restrained to the personalty. *Noscitur a sociis*."

CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., absent,) as follows. The bill seems to be imperfect, neither charging that there was any real estate, nor praying an account or discovery of real estate; and perhaps there is some irregularity in the proceedings.

However, supposing the proceedings to be regular, and the bill amended, &c., the principal question is, whether the real estate is, by the will, bound for this debt?

The testator, in his will, says, "I will and bequeathe to my beloved wife, Mary Deneale, all and singular my estate, both real and personal, during her natural life, for the uses and purposes following, that is to say, for the purpose of raising and educating my children until they respectively arrive at the age of twenty-one years; and it is my will and desire that each of my children, as they respectively attain the age of twenty years, shall become entitled to an equal proportion of my estate, both real

and personal, subject to their proportion or charge of one third of the same, to be retained by my wife, for her support and maintenance, during her life; but I do hereby authorize and empower my said wife to make any of them advances of their proportion, if their merits and good conduct shall warrant the same. And I further recommend to my wife to sell all the negroes that I shall die possessed of, for such term of years as their respective ages shall warrant to them a support when free.

"*Item*, I do hereby direct that an appraisement only of my estate be made, and that no sale of furniture shall take place. I, at this time," (February 13th, 1815,) "am not indebted to any person, and propose to continue so. I am security for my brother James, for two sums of money, for which I hold a deed of trust on his property, sufficient, I hope, to pay the same, and I do direct that my estate shall not be sold to pay those debts until the property so deeded shall be sold, when my estate must be charged with such deficiency."

These are the only clauses in the will in which the word "estate" is used.

He then makes his wife and son his executors, and says, "I do hereby direct that they shall not give security, as my own debts do not demand it."

It seems evident, that when he meant to include the idea of the realty, in the word estate, he added the word "real." Thus, he twice used the expression, "my estate, both real and personal," when it is evident he was contemplating a disposition of his whole estate; and three times he used the word "estate" when it is equally evident that he was contemplating only the ordinary fund out of which the debts of a deceased person are to be paid. That fund is the personal estate. It is evident, also, from his will, that he thought his personal estate would be more than sufficient to pay his debts, including his responsibility for his brother. He directs that an appraisement, only, of his estate should be made. The appraisement alluded to must have been that appraisement of the effects of a deceased person, which is required by law. But the law requires an appraisement of the personal estate only. Having thus used the word estate in reference to the personal estate only, he immediately proceeds to state that he is not indebted, and intended to continue free from debt; that he was bound for a debt of his brother whose property he held in trust, and hoped it would be sufficient to pay the debt; and directs that his own estate should not be sold to pay it until the deficiency of his brother's property should be ascertained. What kind of estate of his own was it that he then had in contemplation, and which he directed not to be sold? Unquestionably, that

estate which is the natural and ordinary fund out of which the debts of deceased persons are to be paid, and which could be sold by his executors, namely, the personal estate.

This inference is strengthened by the circumstance that he had just used the word "estate" in reference to the personal estate only, as is evident from his connecting it with the word "appraisement." The estate, then, which he directed should not be sold, was the personal estate. But, in the same sentence, after saying that his estate should not be sold until a certain event should happen, he goes on to say that when that event shall have happened, then his estate must be charged. What estate? Certainly the same estate which he had forbidden to be sold until the event should happen, namely, the personal estate.

But it is uncertain whether he meant to charge any part of his estate. If the will creates a charge upon any part of the estate, it must be by the words, "When my estate must be charged with any deficiency." These words may be merely declaratory of a fact; and as they evidently have reference to the personal estate, it is a fair inference that he did not mean, thereby, to create any charge upon his estate. His object seems to have been rather to restrain his executors from volunteering the payment of his brother's debt before it should be ascertained whether it would not be paid out of the funds which his brother had provided for its payment, than to create any new charge upon his own estate.

Men do not act without a motive; and we do not see any for the testator's charging his real estate for the debt of his brother, who had already provided a fund for its discharge, which the testator hoped would be sufficient, and when the testator's personal estate was, by him, deemed sufficient to make good the deficiency, if there should be any.

This construction of the will is strengthened by the consideration, that, in the former part of the will, he had made a disposition of his real estate entirely inconsistent with the idea of charging it with his brother's debt. He devised it to his wife, for her life, for the support of his children; and it is one of the soundest rules of construction that a will should be so construed, if possible, as to give effect to every part.

Again, by directing that his executors should not give security for their administration, he seems to show a disposition not to give any additional security for the debt of his brother.

The word "estate" is, often, after the death of a person, used, by metonymy, for the executors or administrators. Thus, we say that "the estate of such a person is indebted to us," or "we are indebted to the estate," or, "we will charge the estate with such a sum," &c. Here it is evident that we use the word "es-

tate " as if it stood in the place of the deceased person. But the correct and simple mode of expressing the idea would be to say that the executor is indebted to us, or the executor must be charged with such a sum, &c.

In this sense we think the testator used the word estate in that clause of his will in which he says, "when my estate must be charged with any deficiency." He is contemplating an event which might take place after his death, and uses the word estate as a substitute for himself, or for his executors. If he had been speaking of the same event as happening in his lifetime, he would probably have said, "when I must be charged with any deficiency." He considers the debt as solely the debt of his brother until the deficiency should be ascertained, when he himself would be the debtor for such deficiency. This seems to be the only idea he meant to convey. He directs that his own estate shall not be applied to the payment of his brother's debt until the deficiency of his brother's estate should be ascertained, when he admits that his own estate will be debtor for such deficiency.

It is true that there are many cases in which the word "estate" in a will, has been holden to convey real estate, even in fee-simple. But the clear doctrine resulting from all the cases upon the subject, is, "That although the word 'estate,' taken independently of the context, by its own force denotes, not only real as well as personal estate, but the highest degree of real estate, and the word 'property,' carries, of itself, both real and personal property; while the word 'effects' is generally and properly applicable to personal estate only; yet that all these words, (and indeed every other form of expression whereby a testator declares his will in respect to the disposition of his property,) submit to the rule which requires a will to be construed agreeably to the intention of the testator, where it can be collected from the whole will." 1 Roberts on Wills, 413.

This rule is exemplified in the case of *Woollam v. Kenworthy*, 9 Ves. 137. There the testator, after directing that his debts should be paid out of his personal estate, gave certain legacies; and having a real estate in land, and a real estate in a rent-charge, devised the latter to his wife for life, and, after her death, to trustees to sell, and after giving some more legacies, directed that as and for the moneys to be received from the sale of the rent-charge, and also the moneys to arise from a sale of his household goods and furniture, plate, linen, china, beds, and bedding, and from all other his estate and effects of what nature or kind whatsoever or wheresoever; the same should, in the first place, be liable and subject to, and charged with the payment of the before-mentioned legacies; and the residue of such moneys to arise

as aforesaid, he directed to be divided and applied as therein mentioned. In that case (which is more analogous to the present than any other we have seen) Lord Eldon held, that by the words "from all other his estate and effects of what nature or kind soever, or wheresoever," no real estate, other than the rent-charge, was liable to be sold for the purposes of the trust, or for the payment of the legacies. This construction resulted from the intention of the testator gathered from the consideration of the whole will. This is the only general rule upon the subject, and is applicable to all cases of construction of wills.

By this rule, for the reasons before given, we are of opinion that the lands of the testator are not charged, by the will, for the debt due to the plaintiffs, and that the bill must be dismissed.

Bill dismissed. Affirmed in Supreme Court of the United States, January term, 1828, 1 Peters, Rep. 585. *Bank of United States v. Smith*, 11 Wheat. 171.

WALTER AND CLEMENT SMITH v. GEORGE JOHNSON.

In an action against the maker of a promissory note, payable at a particular bank, it is not necessary to aver or prove a demand of payment at that bank.

A promissory note, given as collateral or counter security for a note borrowed, is not discharged or vacated by the borrower's discharging or taking up the borrowed note with funds furnished by the lender.

DEBT against the maker of a promissory note for \$5,000, dated January 8th, 1824, payable to and indorsed by Jacob Hoffman to the plaintiffs, and given by Hoffman to them as a collateral guaranty to secure them against their note for the like amount, dated January 9th, 1824, lent to Hoffman for the use of the defendant and Hoffman in a business in which they were jointly concerned.

The note was made payable at the Farmers and Mechanics Bank in Georgetown, and the declaration avers a demand at that bank.

Mr. Jones and *Mr. Taylor*, for the defendant, prayed the Court to instruct the jury, that they must be satisfied that payment of the note was demanded at the said bank before the plaintiffs can recover in this action. *Rowe v. Young*, 2 Brod. & Bing. 165; *Chitty on Bills*, 321.

Mr. Key, *contra*, cited the case of *Rhodes v. Gent*, 5 B and A. 244; 7 Serg. & Rawle, 84; *Foden v. Sharpe*, 4 Johns. 183; *Wolcot v. Van Santvoord*, 17 Johns. 248; 3 *Chitty's Pleadings*, 4; *Butterworth v. LeDespencer*, 3 Maule & Selwyn, 150; *Pearse v. Pemberthy*, 3 Camp. 261.

Patons and Butcher v. Lee.

The COURT (*nem. con.*) refused to give the instruction; considering the averment in the declaration as immaterial in an action against the maker.

The counsel for the defendant, prayed the Court, in substance, to instruct the jury, that if the defendant, or Mr. Hoffman, his partner, had paid and taken up the lent note, the plaintiffs could not recover upon the guaranty note. And the plaintiffs prayed the Court, in substance, to instruct the jury that, if the lent note was taken up, in whole, or in part, with funds furnished by the lenders, the plaintiffs are entitled to recover upon the guaranty note, to the extent of the funds thus furnished by them. Both of which instructions the Court in effect gave.

Verdict for the plaintiffs, \$2,135.68 and interest from the 31st of May, 1825.

Five bills of exceptions were taken; but no writ of error was issued.

PATONS AND BUTCHER v. E. J. LEE.

The clerk of the Circuit Court of the District of Columbia for the county of Alexandria, is not liable for the honest error of judgment of his deputy, in indorsing, upon an execution, the amount upon payment of which the execution was to be discharged, if no minutes or instructions to the contrary were given to the said clerk or his deputy; if the deputy was a person of good understanding and correct demeanor, and capable of performing with propriety and correctness the duties of a deputy-clerk; if, in issuing the execution, and making the indorsement thereon, he exercised honestly his best judgment as to the nature and terms of the judgment which ought to have been entered up in the case; and if the clerk has been guilty of no negligence in superintending his deputy in the discharge of the duties of his office in issuing the execution.

It is not necessary that the Court should do any act to confirm an office-judgment. If not set aside it becomes the judgment of the Court.

ACTION upon the case. The declaration states that the plaintiffs, in November, 1818, recovered judgment, in this Court, against John W. Bronaugh, and George Johnston, his appearance-bail, for \$1,411.10 and costs, and that, by a memorandum at the foot of the judgment it was directed to be discharged by the payment of \$705.55 with legal interest thereon from the 5th of September, 1809, till paid, as appears by the record thereof. That the defendant, being clerk, &c., on the 20th of January, 1819, issued a *ca. sa.* upon that judgment, but negligently instead of issuing the same for \$1,411.10 and costs, together with a memorandum on the execution, expressing that the said execution (costs excepted) was to be discharged by the payment of \$705.55 with legal interest thereon from September 5th, 1809, till paid, in conformity with the said judgment and memorandum, issued the said execution for \$1,411.10 and costs, together with a memoran-

dum thereon expressing that the said execution (costs excepted) was to be discharged by the payment of \$705.55 with legal interest thereon from the 5th of September, 1809, till the 1st of June, 1812, and thus then and there omitted to mention and include, in the said memorandum, the interest from the 1st of June, 1812, till paid, as he ought to have done, whereby the plaintiffs say they have lost the same, amounting to \$284.52, for they aver that the said sum of \$705.55 was not paid till the 20th of February, 1819; and they aver that at the time of the issuing and service of the said execution the said John W. Bronaugh was in good credit and able to pay the whole of the said debt and interest, but has since become totally insolvent; and that the said George Johnston also has become entirely insolvent, so that the said sum of \$284.52 is entirely lost to the plaintiffs; to their damage \$800.

The defendant pleaded "not guilty," and upon the trial of the issue at November term, 1825, *Mr. Taylor*, for the defendant, contended that there was no judgment to warrant the original execution against Bronaugh. There was only an office-judgment, which was not confirmed by the Court, and entered as of the last day of the term.

By the Act of Congress of the 3d of March, 1801, § 3, [2 Stat. at Large, 115,] this Court is to possess and exercise the same powers and jurisdiction, civil and criminal, as were then possessed and exercised by the District Courts of Virginia; and this Court has adopted the same practice.

By the Act of Virginia of December 19, 1792, § 21, p. 111, it is enacted, "that in all actions which shall be brought upon any bond or bonds for the payment of money, wherein the plaintiff shall recover, judgment shall be entered for the penalty of such bond, to be discharged by payment of the principal and interest due thereon, and the other costs of suit, and execution shall issue accordingly."

By the Act of Virginia of December 12th, 1792, § 42, p. 80, respecting the District Courts of that State, it is enacted, that "all judgments by default for want of an appearance or special bail, or pleas, as aforesaid, and nonsuits or dismissions, obtained in the office, and not set aside on some day of the next succeeding court, shall be entered by the clerk as of the last day of the term, which judgment shall be final in actions of debt founded on any specialty bill or note in writing ascertaining the demand, unless the plaintiff shall choose in any such case to have a writ of inquiry," &c.

No final judgment can be entered in the office. It does not become a judgment of the Court unless entered in the records of the Court as a judgment of the Court.

Mr. Hewitt, contra, for the plaintiffs, contended that it is not necessary that the Court should do any act to confirm office judgments, nor to sign any order confirming them. They are valid if not set aside on some day of the next succeeding court. It has not been the practice to enter the office-judgments on the Court's docket.

(Upon inquiry it appeared that it was not the practice, until after November term, 1818, to enter the office-judgments on the docket of the Court on the last day of the term.)

The COURT (MORSELL, J., *contra*,) was of opinion, that it was not necessary that an office-judgment should be entered upon the docket of the Court on the last day of the term, or that the Court should do any act to confirm the office-judgments; but that, if not set aside during the first term after the judgment in the office, it becomes the judgment of the Court, and is to be entered, by the clerk, as of the last day of that term, such being the express words of the act.

Mr. Hewitt, for the plaintiff, prayed the Court to instruct the jury, that it is not necessary for him to prove the defendant guilty of gross negligence.

Mr. Taylor, for the defendant, *contra*, cited *Pitt v. Walden*, 4 Burr. 2060; *Jenkins v. Waldron*, 11 Johns. 114; *Stephens v. White*, 2 Wash. Rep. 212.

The COURT (THRUSTON, J., absent,) refused to give the instruction, because it was abstract; but afterwards, upon a statement of the evidence, gave an instruction in favor of the defendant, which was reduced to writing, but is lost or mislaid.

The jury, however, found a verdict for the plaintiff, and \$400.22 damages.

But the COURT granted a new trial, on the ground that the verdict was against the law as laid down by the Court.

The cause now came on again for trial upon the general issue, and the COURT (THRUSTON, J., absent,) still adhered to its former opinion, and stated it to be in substance, that if the jury should be of opinion, from the evidence, that Mountjoy Bailey, the deputy-clerk, was of competent skill and knowledge to discharge the duty of deputy-clerk, and exercised faithfully and honestly his best judgment in making the indorsement, the defendant, the principal clerk, is not liable for the error of his deputy.

The plaintiff's counsel took a bill of exceptions, which stated that, on the trial of the issue in this cause, the plaintiff, to support the issue on his part,¹ gave in evidence to the jury the record of

¹ Mr. Patons, one of the plaintiffs, had departed this life since the commencement of the action.

proceedings in the action against John W. Bronaugh, and the *ca. sa.* issued against him and George Johnston, his appearance-bail, dated January 20, 1819, with the indorsement thereon in these words: "Memorandum. This execution (costs excepted) is to be discharged by the payment of \$705.55, with legal interest thereon, from the 5th of September, 1809, to the 1st day of June, 1812."

And also the bond of the said Bronaugh to the said Patons and Butcher, upon which the said judgment was rendered; the condition of which was, that he should pay them \$705.55, with legal interest from the 5th of September, 1809, on the 1st day of June, 1812.

Also the forthcoming bond taken under the said execution, and the notice and judgment and execution thereon, dated the 30th of April, 1819, on which the money called for thereby was made and paid over to the plaintiffs' attorney.

And further proved, that the defendant was clerk of this Court when those executions were issued, and up to the time of the trial. That Bronaugh and Johnson were both insolvent; the former having been discharged under the insolvent act on the 20th of November, 1820.

The defendant then proved, that the executions and forthcoming bond aforesaid, were all delivered to the plaintiffs' attorney, who obtained judgment on that forthcoming bond, dated June 18, 1819. That the execution of the 20th of January, 1819, had been issued by Mountjoy Bailey, who was then the defendant's deputy; and that in issuing that execution, he had examined the record and bond, and had issued the execution according to his construction of the true interpretation of the said bond, and of the condition thereof.

The defendant also adduced evidence to prove, that the said Mountjoy Bailey was a person of good understanding and correct demeanor, and capable of performing with propriety and correctness the duties of a deputy-clerk. It was admitted, that neither the plaintiffs nor their attorney had given any instructions to the clerk or his deputy, as to the mode of entering up the judgment, or awarding the execution; and that the execution had been issued and delivered to the plaintiffs' attorney under general orders from him, before any record at large had been made up in the suit.

The defendant further gave evidence to show, that on the night of the 25th of January, 1819, his arm had been broken, by which accident he had been confined to his house all the residue of that month, and the whole of the months of February and March. That about 220 executions had been issued on the judgments of November term, 1818, all dated on the 20th of January, 1819.

That the issuing and docketing of those executions occupied at least two weeks after the 20th of January, 1819, and the execution in this case being upon a forthcoming bond, was among the last issued.

On which evidence, the defendant's counsel prayed the Court to instruct the jury that the same was not sufficient in law, if believed by the jury, to charge the defendant in this action, or to subject him to damages for the error in the execution of the 20th of January, 1819.

Which instruction the Court refused to give, but instructed them, that if they should believe the facts to be as above stated, and should also believe from the evidence aforesaid, that there were no minutes nor instructions furnished to the clerk, by the plaintiffs, or their attorney, at the time the said short entry of the judgment was made, and that the said short entry, and the other docket entries, and the said bond, were the guides by which the said deputy-clerk issued the said execution, and made the said indorsement thereon; and that in issuing the said execution, and in making the said indorsement thereon, he exercised honestly his best judgment as to the nature and terms of the judgment which ought to have been entered up in the case; then his error in misunderstanding the inference at law, which entitled the plaintiff to interest until the time of payment, is not such a want of skill, or such negligence as will charge the defendant in this action.

The defendant further prayed the Court to instruct the jury, that if, from the evidence so as aforesaid given, they should be of opinion that the mistake charged in the declaration in issuing the execution therein mentioned, was committed by Mountjoy Bailey, the deputy of the defendant, duly appointed and sworn as such, and that the said Mountjoy Bailey was, at the time of issuing the said execution, competent to the correct discharge of the duties of the said office, and that the defendant has been guilty of no neglect in superintending the said deputy in the discharge of the duties of his said office in issuing the said execution; then the defendant is not liable to the plaintiffs in this action, for the said mistake of his said deputy.

Which instruction the COURT gave as prayed.

To which instructions the plaintiffs' counsel excepted.

Verdict for the defendant.

The plaintiffs' counsel moved the Court for a new trial, and cited *Russell v. Clayton*, 3 Call, 37, 41, and *Stewart v. Madison*, 1 Call, 417, 481.

(THURSTON, J., absent.)

The Court continued the cause to November term, 1826, for consideration, and at that term (November 16, 1826,) refused to grant a new trial. (THURSTON, J., absent.)

Smith v. Hoffman & Johnson.

WALTER AND CLEMENT SMITH v. HOFFMAN & JOHNSON.

Parol evidence is not competent to vary a written agreement.

A written contract by one of two joint partners, made in his own name, does not bind the other partner, although the money obtained thereby is brought into the joint concern.

The Court will not sign a bill of exceptions to the terms in which a certain paper, which had been offered in evidence, is described in the instruction of the Court to the jury, (the paper itself being referred to;) but will sign a bill of exceptions to the refusal of the Court to sign the former bill of exceptions.

A written contract, the terms of which are clear and unambiguous, is conclusive; and parol evidence is not admissible to contradict it.

THIS was an action of *assumpsit* against Jacob Hoffman and George Johnson, for money paid, laid out, and expended by the plaintiffs, for the use of the defendants, and at their request. Johnson only was taken, and the writ abated, as to the other defendant, by the marshal's return that he was not an inhabitant of the district.

Upon the trial of the general issue, the plaintiffs offered evidence, that on the 10th of December, 1823, the defendants entered into a special partnership in the business of making bacon and packing pork, which partnership was dissolved by mutual consent on the 21st of January, 1824.

That the defendant Hoffman borrowed of the plaintiffs their two notes for \$5,000 each, at 60 days, one dated January 9, 1824, the other, January 17, 1824, and as security against the first of those notes, the plaintiffs received from Mr. Hoffman, the said George Johnson's note, indorsed by Mr. Hoffman for the like amount at 60 days, dated on the 8th of January, 1824, so as to fall due one day before the plaintiff's note of the 9th of January, 1824; and when they lent Mr. Hoffman their note of the 17th of January, 1824, he gave them his receipt therefor in the following words:—

“Georgetown, 17th January, 1824. Received from Walter and Clement Smith, their note dated this day for \$5,000 payable in the Bank of Alexandria, being issued for my use I promise to provide for and pay the same at maturity. Jacob Hoffman.”

The plaintiffs also offered parol evidence, by the deposition of the said Jacob Hoffman, that he borrowed of the plaintiffs their note, dated January 9, 1824, for \$5,000, for the use of Hoffman & Johnson; that he informed them of their partnership in purchasing pork; that the note was discounted in the Bank of Potomac, and the proceeds exclusively applied to the payment for pork in the concern of Hoffman & Johnson; that the said Hoffman obtained from the plaintiffs their other note for \$5,000, dated

Smith v. Hoffman & Johnson.

January 17, 1824, for the use of the bacon concern of Hoffman & Johnson. That in applying for that loan, he stated to one of the plaintiffs, that the character of the said Johnson was most respectable, and that he was competent to transact the business in case of the ill health of the said Hoffman. That about the same time he made an assignment of steamboat stock and slaves, to one Richard Smith, to secure the plaintiffs for the loan of those notes. That the last-mentioned note was discounted at the Bank of Alexandria, and the proceeds (except \$508,) applied to the bacon concern of Hoffman & Johnson. That the only sum paid upon those notes, to his knowledge, was \$500, paid by himself in April, 1824. That the effects of the concern were placed in the hands of Mr. Johnson in May, 1824, to be disposed of conformably to the articles of copartnership. That when he borrowed the notes, the understanding was, that they were to be renewed until he could pay them out of the effects of the bacon concern of Hoffman & Johnson.

The plaintiffs also offered parol evidence that the said Hoffman kept an account in the Bank of Alexandria, in his own name, which, by the officers of that bank, was usually denominated as the "pork account," and was intended and declared by both the defendant and the said Hoffman to contain the bank account in relation to the pork business of the concern of the said Hoffman & Johnson. That the offer of the said note for discount in the said bank, (of which the said Johnson was one of the directors,) by the said Hoffman, and the discount of the same were entered in the books of the bank as for the use of the said Hoffman, and the proceeds thereof credited to the said Hoffman in the said account, and drawn out by checks of the said Hoffman alone, and applied as aforesaid.

That the said note of the 17th of January, 1824, was renewed from time to time, until it was finally taken up by the plaintiffs on the 19th of October, 1824, the discounts upon the renewals having been paid by Mr. Hoffman, except the two last in May and July, 1824, which were paid by Mr. Johnson.

The plaintiff also offered in evidence a letter from Mr. Hoffman to Clement Smith, President of the Farmers and Mechanics Bank in Georgetown, and one of the plaintiffs, bearing the same date as the note, (17th January, 1824,) in which he says, "This will be handed to you by Mr. George Johnson, my partner in the pork establishment, and friend. He will hand you a check for \$2,500 to meet a check for that amount drawn on you yesterday," &c. Also a letter from Mr. Johnson to the same, dated March 2d, 1824, in which he says, "I inclose a note of Mr. Hoffman for \$2,500, which he says was promised to be discounted at

Smith v. Hoffman & Johnson.

your bank to-morrow, to renew the same amount paid there the last week. Mr. Hoffman is absent from town, and the money absolutely relied on to meet engagements to same amount. I hope therefore your board will be so good as to give us the money. Please write me, by to-morrow's mail, when I may check for the amount."

And the plaintiffs further offered parol evidence that on one or two occasions when the account of Mr. Hoffman in the Bank of Alexandria was overdrawn, the defendant, being notified thereof, said, "he would see Mr. Hoffman and have it attended to."

That the note of the 9th of January, 1824, which was discounted for Mr. Hoffman at the Bank of Potomac, was curtailed and renewed from time to time until October, 1824, when it was taken up by the plaintiffs, the discounts having been paid by Mr. Hoffman, except the two last, which were paid by Mr. Johnson. The plaintiffs also gave in evidence sundry advertisements in the name of Hoffman & Johnson.

The defendant then offered in evidence the before-mentioned receipt and promise of Mr. Hoffman of the 17th of January, 1824; and two deeds of trust, of certain slaves, and steamboat stock from Mr. Hoffman to Richard Smith, of the 17th of January, 1824, (executed on the 22d of January, 1824,) and the 10th of November, 1824, to secure the plaintiffs against their notes loaned as aforesaid, both of which deeds state the note to have been loaned to the said Jacob Hoffman, and that he was desirous to secure the plaintiffs from any loss which might accrue to them "from the non-payment of the said notes by the said Jacob Hoffman;" and authorize the trustee to sell the said slaves, &c., "if the said Jacob Hoffman, his heirs, executors, or administrators, shall fail to pay, when required, the notes aforesaid of the said Walter and Clement Smith."

The defendant also offered in evidence the advertisements aforesaid, and testimony to prove that the said Hoffman & Johnson carried on their said pork concern in that name, and kept their book of sales and accounts in that name; and the said Hoffman at the same time carried on various branches of trade and business, in which the said Johnson was not concerned. That the said Hoffman, during the continuance of the said concern of Hoffman & Johnson, was in the habit of drawing checks for credits standing in his name in the said account in the Bank of Alexandria, as well as in other banks indiscriminately for the general purposes of all his concerns and for his private expenses.

That the defendant also, at the same time, was engaged in other trade and business on his own account, in which the said Hoffman had no concern or interest, and never drew out or at-

tempted to draw out of any of the said banks any money standing to the credit of the said Hoffman.

The plaintiffs, upon the evidence aforesaid, claimed to recover of the defendants the amount of the plaintiffs' note of the 17th of January, 1824, thus taken up by them, deducting half of the proceeds of the sales of the negroes, the other half having been applied to the credit of the other note of the 9th of January, 1824.

Whereupon the COURT (THRUSTON, J., absent,) instructed the jury that the written documents, so given in evidence in this case, immediately relating to the note of the 17th of January, 1824, lent by the plaintiffs to Jacob Hoffman, and discounted at the Bank of Alexandria, taken in connection with the written documents relating to the nature, name, and extent of said partnership, do by their own terms import that the said note of the 17th of January, 1824, was lent by the plaintiffs to Jacob Hoffman, upon his sole credit and responsibility, and not upon the credit and responsibility of Hoffman & Johnson; and that the promise of the said Hoffman, in the said receipt, to provide for and pay the said note at maturity, was the sole and separate promise of the said Hoffman, and not the joint promise of Hoffman & Johnson. That the parol evidence produced by the plaintiffs in this case as aforesaid, is not competent and sufficient to change the import or terms of the said written documents, so as to charge the defendant, in this action, for the failure of Hoffman to provide for and pay the said note at maturity, according to the promise contained in his said receipt. To which instruction the plaintiffs excepted, and took their bill of exceptions. And the plaintiffs by their counsel objected to that part of the foregoing instruction which describes the said paper, purporting to be the receipt of the said Jacob Hoffman, as having been "given by said Hoffman to the plaintiffs for the said loaned note, and as promising to provide for and take up the said note at maturity," because no other evidence was offered in relation to the said facts than is hereinbefore stated in the statement of all the evidence in the cause as offered both by the plaintiffs and by the defendant, the said statement comprehending all the evidence offered on both sides in relation to said receipt.

But the COURT, notwithstanding this objection, retained the said words in their instruction, and described the said receipt as having been given to the said plaintiffs by the said Hoffman for the said loaned note of 17th January, 1824; to which description of the said note the plaintiffs, by their counsel, excepted, and prayed the Court to sign and seal their bill of exceptions.

But the Court refused to sign the same; to which refusal the

plaintiffs excepted, and the Court signed and sealed the bill of exceptions to such refusal, on the 3d of May, 1826.

The plaintiffs, then, upon the statement of facts upon which their first prayer in the trial of this cause was predicated, prayed the Court to instruct the jury, that the receipt signed "Jacob Hoffman," offered in evidence by the defendant, and its being in the plaintiffs' possession, are not conclusive to show that the plaintiffs took the said receipt as their security for the loan of their note of \$5,000, of the 17th of January, 1824; and that if the jury believe from all the circumstances given in evidence, that the same was not so taken as their security for such loaned note of the plaintiffs, then the plaintiffs are not precluded from recovering by such receipt.

Which instruction the Court refused to give as prayed; but instructed the jury, that the said receipt, being admitted by the plaintiffs to be in the handwriting of the said Jacob Hoffman, and having been produced at the trial of this cause by the plaintiffs in consequence of a notice from the defendant calling upon them to produce the same, is *prima facie* evidence, and, in the absence of contradictory evidence, is conclusive that the said receipt was given by the said Hoffman to the said plaintiffs, at the time it bears date, and that it relates to the aforesaid note of the 17th of January, 1824, for \$5,000, discounted as aforesaid, at the Bank of Alexandria; and that if the jury should be satisfied by the said evidence that the said receipt was so given and does so relate, then the said receipt, taken in connection with the other written documents given in evidence in this cause, is conclusive evidence that the said note of the 17th of January, 1824, was lent by the plaintiffs to the said Jacob Hoffman, upon his sole credit and responsibility, and not upon the credit and responsibility of the said joint concern of Hoffman & Johnson.

To which refusal to give the instruction prayed by the plaintiffs' counsel, the plaintiffs excepted, and took their bill of exceptions.

After the delivering of the foregoing opinions and instructions of the Court to the jury, the plaintiffs' counsel having still insisted and argued before the jury upon the supposed inconsistency between the deposition of Jacob Hoffman and his said written receipt and promise of the 17th of January, 1824, as contradictory evidence, from which, with the other evidence, the jury may infer that the said receipt was never given by the said Hoffman; the defendants still objected and prayed the opinion and instruction of the Court, that the said deposition contains no evidence from which the jury could infer, (against the evidence of the production of the said receipt by the plaintiffs, and their admission of the

Smith v. Hoffman & Johnson.

handwriting,) that the said receipt was never given as it purports ; which instruction the Court gave as prayed, and the plaintiffs took their fourth bill of exceptions.

Mr. Jones, for the defendant, cited *Emly v. Lye*, 15 East, 7.

Mr. Swann and *Mr. Key*, *contrà*, cited *Willet v. Chambers*, Cowp. 814.

The jury found a verdict for the defendants.

The plaintiffs carried the cause to the Supreme Court by writ of error, where the parties settled the matter by compromise, and the writ of error was dismissed by consent at January term, 1828.

CIRCUIT COURT OF THE UNITED STATES.

MAY TERM, 1826, AT WASHINGTON.

BARRELL v. SIMONTON.

In an action for maliciously arresting and holding the plaintiff to bail without probable cause, the affidavit to hold to bail must aver that the suit in which the plaintiff was so maliciously holden to bail was determined; and a declaration for such malicious arrest and holding to bail, must contain such an averment, or it will be bad on general demurrer.

ACTION ON THE CASE for maliciously causing the plaintiff to be arrested, imprisoned, and held to bail in Baltimore, without probable cause.

Neither the declaration nor the affidavit to hold to bail contained any averment that the suit in Baltimore upon which the arrest was made, was determined.

Mr. R. S. Coxe, for the defendant, moved for leave to enter his appearance without special bail, and contended that this was a local action and would lie only in Maryland; and that the affidavit was insufficient in not averring that the action in Baltimore was determined; for until that suit was at an end no action would lie for the malicious arrest. That fact constitutes a necessary part of the plaintiff's title to recover. *Morgan v. Hughes*, 2 T. R. 232; *Fisher v. Bristow*, Doug. 215; 1 Sellon's Practice, 57; *Sinclair v. Eldred*, 4 Taunt. 7; *Woodford v. Ashley*, 11 East, 503; 8 Wentw. 319; Selw. N. P. 935; *Farmer v. Darling*, 4 Burr. 1971; *Rodriguez v. Tadmire*, 2 Esp. Rep. 719; *Kirk v. French*, 1 Esp. Rep. 77; 1 Sellon's Pr. 107, (a. 2;); 2 Chitty on Pleading, p. 225, note *d.*, p. 291, 299; *Morgan's V. M.* 404; *Stennel v. Hogg*, 1 Saund. 227; Selw. N. P. 936, 942; 2 Phil. on Ev. ch. 9, pp. 110, 116; *Imley v. Ellefsen*, 2 East, 453; *Archbold*, Civ. Pl. 52; *Reynolds v. Kennedy*, 1 Wils. 232.

Mr. Lear and *Mr. Barrell*, *contrà*. It is only necessary to show a *prima facie* cause of action. There is a difference between an action for malicious prosecution, and for a malicious arrest. "Prosecution" means criminal prosecution. The courts have been more strict in the former than in the latter, because

Barrell v. Simonton.

the former tend to prevent the punishment of crimes. In actions of conspiracy the declaration followed the writ, which contained the words, "*legitimo modo acquietatus*," and actions upon the case, in nature of conspiracy, followed, without reason, the same form. Malice, and the want of probable cause, are the gist of the action for malicious arrest. The determination of the prior action in favor of the present plaintiff, would be only a circumstance tending to prove the want of probable cause. The want of the averment of the determination of the former suit is aided by a verdict; and it is doubted whether it would be fatal on demurrer. *Skinner v. Gunton, Lyon, & Leason*, 1 Saund. 228, note; *Smith v. Cattel*, 2 Wils. 376.

At this stage of the cause, the question, whether the former suit was determined, ought not to be raised. It is not necessary to aver it in the declaration. If the writ, upon which the arrest was made, was not issued by the proper clerk, or not returnable to the proper court, the plaintiff never could show that the suit was determined; and if the averment is necessary the declaration may be amended; and if the former suit should be determined in favor of the present plaintiff, before the pleadings in this cause are made up, it would be sufficient.

Mr. Coxe, in reply, admitted that these actions, for malicious arrest and for malicious prosecution, grew out of the old action of conspiracy; but no distinction is taken between actions for malicious prosecution and for malicious arrest. In either the declaration must show that the former suit has been determined in favor of the plaintiff.

It is true, that after verdict the fact shall be taken to have been proved at the trial, because the plaintiff could not recover without that proof; but the same authorities show that the want of the averment is fatal upon the demurrer.

The affidavit to hold to bail must show all the facts necessary to entitle the plaintiff to recover.

The COURT took time, and upon full consideration of the following authorities, was of opinion, (*THRUSTON, J.*, doubting,) that the affidavit to hold to bail was insufficient, because it did not state that the suit in Baltimore had terminated in favor of the present plaintiff. *Waterer v. Freeman*, Hob. 267, (17 Jac.); *Skinner v. Gunton et al.* 1 Saund. 228; *Stennel v. Hogg*, 1 Saund. 226, note 1, by Serg. Williams; *Martin v. Lincoln*, Esp. N. P. 527; *Farrel v. Nunn*, Bul. N. P. 13; *Parker v. Langley*, 10 Mod. 145, 209; *Brownlow*, Redivivus, 61; *Registrum Brevium*, 134, a; *Shotbolt's case*, Godbolt, 76; *Fisher v. Bristow et al.* Doug. 215; *Morgan v. Hughes*, 2 T. R. 225; *Lewis v. Farrell*, 1 Str. 114; *Lilly's Ent.* 15, 23, 35; *Sutton v. Johnstone*, 1 T. R. 497, 498.

Levy Court v. Ringgold.

The defendant was permitted to appear without special bail. At a subsequent term, he filed a general demurrer to the declaration; and at May term, 1827, the suit was struck off by order of the plaintiff.

LEVY COURT OF WASHINGTON COUNTY v. TENCH RINGGOLD,
Marshal, D. C.

The Levy Court of Washington county, D. C., are only entitled to a moiety of the fixed fines, penalties, and forfeitures accruing under the adopted statutes of Maryland; not of the common-law discretionary fines, nor of those imposed under original Acts of Congress.

The Attorney of the United States for the District of Columbia is not bound, by the 2d section of the Maryland Act of 1795, c. 74, to order writs of *ca. sa.* for fines, &c., on the application of the marshal; nor can the marshal order them without the authority of the district attorney, who has a discretion, in that respect, which the marshal has no right to control.

The marshal, D. C., is not liable for fines which he has no means of collecting.

There is no Act of Congress, which imposes upon the Attorney of the United States for the District of Columbia, the special duties imposed upon the attorney-general of Maryland and his deputies by the statutes of Maryland.

The Levy Court of Washington county is not bound to repair the gaol erected by the United States in that county.

The marshal had no right to expend the funds of the Levy Court of Washington county in the repairs of the gaol without their order.

At May term, 1825, *Mr. Marbury*, having given previous notice, obtained a rule in behalf of the Levy Court of Washington county, D. C., upon *Tench Ringgold*, marshal of the District of Columbia, to show cause "why judgment should not be rendered against him in favor of the said Levy Court for the sum of \$2,266.51, which said sum of money" they claim against him for their proportion of the fines, penalties, and forfeitures, "collected, or which ought to have been collected" by him and paid to the said Levy Court under the provisions of the 2d section of the Act of Congress, supplementary to the Act concerning the District of Columbia.

Upon the appearance of the marshal, the Court ordered the auditor of the Court to ascertain and report what moneys, on account of fines imposed by this Court, have been collected by the marshal since the month of December, 1819; what fines since that period remain uncollected, and whether the persons from whom the same were to have been collected, were insolvent, and which of them; and whether the marshal has applied any of the moneys collected by him, as aforesaid, towards the repairs of the gaol, or towards any other public uses, and to what amount; and to state any other matters specially which either party may request.

Levy Court v. Ringgold.

On the 5th of January, 1826, the auditor reported,		
That half of the whole amount of fines imposed, was		\$2,267.66
That half of the amount to be deducted for pardons and fines not collected, was		1,660.17
That the amount received by the marshal, was		\$609.49
That the marshal should be credited for repairs of the gaol,	\$814.95	
And for money paid to the Judge of the Orphans' Court, &c.,	157.00	
		971.95
Leaving a balance due to the marshal of		\$364.46

To this report *Mr. Marbury*, for the Levy Court, excepted. "1st, Because the auditor has allowed credit to the defendant in cases where no execution issued against the party fined. 2d, Because the auditor has allowed credit to the defendant for money expended by him on the gaol of Washington county and for money paid to the judge of the Orphans' Court for the same county, without proof of any authority from the Levy Court to make such expenditures and payments."

The 2d section of the Act of Congress of the 3d of March, 1801, [2 Stat. at Large, 115,] supplementary to the Act concerning the District of Columbia, provides, that "all fines, penalties, and forfeitures accruing under the laws of the States of Maryland and Virginia, which by adoption have become the laws of this district, shall be recovered with costs, by indictment or information in the name of the United States, or by action of debt in the name of the United States and the informer; one half of which fine shall accrue to the United States, and the other half to the informer; and the said fines shall be collected by, or paid to the marshal; and one half thereof shall be by him paid over to the board of commissioners hereinafter established," (that is, the Levy Court,) "and the other half to the informer; and the marshal shall have the same power regarding their collection, and be subject to the same rules and regulations as to the payment thereof, as the sheriffs of the respective States of Maryland and Virginia are subject to in relation to the same."

Mr. Marbury, in support of his first exception to the auditor's report, contended that the 2d section of the Act of the 3d of March, 1801, [2 Stat. at Large, 115,] made the marshal liable to all the obligations of the sheriffs in Maryland, in regard to the collection of fines; and liable to the same summary process which is provided by the Maryland Act of November, 1797, c. 43.

By the Maryland Act of November, 1795, c. 74, § 7, the sheriffs of that State were "answerable for all fines, penalties, and forfeitures imposed on the inhabitants of their respective counties by the judgment of any court" within that State, "where no execution shall issue for recovery of such fine, penalty, or forfeiture, unless the said sheriffs shall respectively make it appear, to the satisfaction of the treasurer, that the party on whom such fine, penalty, or forfeiture was imposed was insolvent, and unable to pay the same."

Under this act, *Mr. Marbury* contended that the marshal was liable for the fines in all cases where no execution for them had issued, unless he proved the insolvency of the parties fined.

By the second section of the same act it was made the duty of the attorney-general of Maryland to order an execution to issue for a fine, penalty, or forfeiture, on the application of the sheriff.

Under this section *Mr. Marbury* contended that the marshal was bound to apply to the district attorney to order an execution, in every case where the fine was not paid, and the party not insolvent; and that it was the duty of the district attorney to order it.

As to the second exception, *Mr. Marbury* contended that the Levy Court was not bound to repair the gaol, and had no right to apply the money of the Levy Court to that object without their order.

Mr. Lear, contra.

The marshal had no authority to order an execution, nor to require the district attorney to order it, and therefore ought not to be liable in cases where no execution issued.

The Levy Court have a right only to one half of the fines, penalties, and forfeitures accruing under the adopted statutes of Maryland, not of the common-law fines, nor fines under Acts of Congress.

The repairs of the gaol were made by the order of this Court. The county is as much bound to repair the gaol as to repair the roads, or to pay the judge of the Orphans' Court, which it has always done; and the half of the fines was given to the Levy Court for that purpose.

The marshal cannot be liable where he is in no default.

Mr. Key, in reply.

The marshal is bound to use due diligence, and is *primâ facie* liable for all the fines, but may discharge himself by showing the parties to be insolvent, and perhaps by showing that he applied to the district attorney for executions, but did not get them.

May 13, 1826. CRANCH, C. J., delivered the opinion of the Court, as follows, (*THRUSTON, J., contra.*)

Under the Act of Congress of the 3d of March, 1801, § 2, [2 Stat. at Large, 115,] the Levy Court of Washington county, who represent, or, in fact, are, the commissioners therein named, claim, of the marshal, one half of all fines, penalties, and forfeitures imposed, assessed, or recovered in this Court, from the beginning of December term, 1819, to October term, 1821, inclusive, amounting, as they say, to \$2,266.51. This amount is understood as including one half of the fines imposed by the Court for common-law offences, the amount of which is discretionary, and of those discretionary fines which are imposed by the Court, under Acts of Congress, (as in the cases of larceny, manslaughter, &c.,) and of fines, penalties, and forfeitures fixed by Acts of Congress for certain offences, as well as the fixed fines, penalties, and forfeitures accruing under the adopted statutes of Maryland.

But we think that the Levy Court are entitled only to the latter.

The laws of Maryland and Virginia, which were adopted by the Act of Congress of the 27th of February, 1801, [2 Stat. at Large, 103,] included many penal laws, and the modes of recovering the fines, penalties, and forfeitures accruing thereon, were various. In some cases they were to be recovered by indictment; in some, by information; in some, by action of debt; in some, by seizure; in some, by conviction before a justice of the peace; in some, before the county courts; in some, before the general courts, &c. In some cases, the fine, penalty, or forfeiture was recovered for the use of the State; in some, for the use of the county; in some, for the use of particular literary institutions; and in some for the use of the poor, &c.

It was evident that much perplexity and embarrassment would arise in the execution of those laws, unless some precise mode of recovery and appropriation of those fines, &c., should be provided. To effect this purpose, and to designate the person who should receive or collect the fines, the second section of the Act of the 3d of March, 1801, was enacted.

As it regards the fines, penalties, and forfeitures accruing under the laws of Maryland, we think it refers only to those fines, penalties, and forfeitures which are alluded to in the Act of Maryland, 1795, c. 74, entitled, "An Act for the more speedy and effectual recovery of fines, penalties, and forfeitures," and those, we think, were such as were imposed and fixed by statute, and not those discretionary fines which the courts of law imposed for misdemeanors and other common-law offences.

We are induced to think so for the following reasons:

The preamble of that act (1795, c. 74,) declared that doubts

were entertained, whether, under the existing laws of the State, a writ of *ca. sa.* could be issued "for the recovery of any fine, penalty, or forfeiture;" whereas the Act of February, 1777, c. 13, entitled "An Act for the more speedy and effectual recovery of common-law fines and forfeited recognizances," § 2, expressly gives a writ of *ca. sa.* for fines imposed by any court of record for any common-law offences, which, in the preamble of the same statute, are described as "the common-law fines imposed on public delinquents." And, by another statute of the same session, (c. 6,) and passed on the same day, (20th April, 1777,) entitled "An Act to direct in what manner fines, forfeitures, penalties, and amerciaments shall be applied," it is enacted, that "all fines, penalties, and forfeitures directed and imposed by any of the laws now in force, and all fines, penalties, and forfeitures which shall hereafter be inflicted or imposed, and no mode of recovery or application shall be directed, shall and may be recovered in manner following," namely: where the sum did not exceed £5, the same might be recovered with costs, in the name of the State and the informer, before any one justice of the peace in the county; and where the sum exceeded £5, by indictment, in the name of the State; or by action of debt, in the name of the State and of the informer, in which it shall be sufficient to allege "that the defendant is indebted to the State and the informer, in the fine, penalty, or forfeiture, by the act directed and imposed, whereby action accrued, without setting out the special matter." When the recovery should be before a justice of the peace, he might either commit the offender, or, by warrant, direct the constable to levy the fine on the offender's goods and chattels; and was required to pay one half to the informer and the other to the sheriff, who was to pay it into the treasury. If recovered by indictment, the Court might commit the offender till payment should be made to the sheriff; or might order execution, to levy the fine and costs on the offender's lands, goods, or chattels. If recovered by action of debt, the sheriff was to pay one half to the informer and the other to the treasurer.

By the same act, no prosecution or suit should be commenced for any fine, penalty, or forfeiture unless within one year from the time of the offence committed.

Thus, it appears, that, in the same session, the Legislature gave a writ of *ca. sa.* for common-law fines, but refused it in all cases of fines, penalties, and forfeitures; clearly discriminating, as we think, between common-law fines and those fines, penalties, and forfeitures which accrued under, or were imposed by, law, and which could be recovered by indictment or action; and the prosecution for the recovery of which could be limited by statute,

Levy Court v. Ringgold.

and evidently showing, that, by fines, penalties, and forfeitures, they meant only those fines, penalties, and forfeitures which were prescribed by statute, and which could, in the language of the Act of Congress of the 3d of March, 1801, [2 Stat. at Large, 115,] be correctly said to be "accruing under the laws of Maryland," and which could be recovered either by indictment or action of debt.

The Act of 1795, c. 74, uses the same terms, namely: "fines, penalties, and forfeitures," and provides, that, for all such, a *ca. sa.* may be issued, thereby placing them, in that respect, on the same ground as common-law fines, which are not named in that act.

When, therefore, the Act of Congress uses the same terms, "fines, penalties, and forfeitures" accruing under the laws of Maryland, they must be understood as used in the same sense in which they are used in the laws of Maryland, where, we think it is evident, they mean only those fines, penalties, and forfeitures which are prescribed by the statutes of Maryland. To the half of such only do we think the Levy Court entitled.

The next inquiry is, how far is the marshal chargeable to the Levy Court for fines, penalties, and forfeitures, of that description, which have never, in fact, been received by him. Common-law fines, and fines imposed originally by acts of Congress, are out of the question.

By the Act of Maryland, 1795, c. 74, § 2, it is made the duty of the attorney-general of Maryland, upon application of the sheriff, to order writs of *ca. sa.* for such fines, penalties, or forfeitures.

By the 3d section, such fines, &c., are to be paid to the sheriff to whom the *ca. sa.* shall be directed, to wit, it authorizes the sheriff to receive the money on the *ca. sa.*

By the 4th section, the sheriff is to have the body, on the return of the *ca. sa.* or pay the money.

By the 5th section, the clerk of the court is to transmit to the treasurer, a list of the *ca. sa.*'s issued under that act, and of the sums of money which the sheriff shall have acknowledged to have received for such fines, &c.

The 6th section directs the sheriff to pay over the costs upon the executions, to the persons entitled to them.

And the 7th enacts, "That the respective sheriffs of this State shall be answerable for all fines, penalties, and forfeitures, imposed on the inhabitants of their respective counties, by the judgment of any court within this State, where no writ of execution shall issue for the recovery of such fine, penalty, or forfeiture, unless the said sheriffs shall respectively make it appear to the satisfaction of

the treasurer, that the party on whom such fine, penalty, or forfeiture was imposed, was insolvent, and unable to pay the same."

The questions, arising under this act, are,

1. Whether the attorney of the United States for this district, is bound by the 2d section of the Act of 1795, c. 74, which requires the attorney-general of Maryland, or his deputies, on the application of the sheriff, to order writs of *ca. sa.* for such fines, &c.

2. Whether the marshal can order such writs without the authority of the attorney for the district.

3. Whether the marshal can collect the fine without a writ of execution.

4. Whether he is liable for a fine which he had not the legal means of collecting, unless he shall show the offender to be insolvent; and,

5. Whether, if he be so liable, there be any person substituted for the treasurer of Maryland, to decide the fact of such insolvency.

1. The attorney of the United States, for the district, holds his office under the 9th section of the Act of Congress of the 27th of February, 1801, [2 Stat. at Large, 103,] and is to take the oath and perform the duties required of the district attorneys of the United States. By the Act of Congress of 1789, c. 19, § 35, (the Judiciary Act,) [1 Stat. at Large, 73,] the district attorneys of the United States are to be sworn or affirmed to the faithful execution of their office; and it is made their duty "to prosecute in such district, all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States may be concerned."

There is no act of Congress which imposes upon the attorney for this district, the special duties imposed upon the attorney-general of Maryland, and his deputies, by the statutes of that State. The power to prosecute all delinquents for crimes and offences, seems to include the power of ordering execution against them upon conviction. This has been the constant practice in this district; and we think that the district attorney has a discretion in that respect, which the marshal has not a right to control.

2. If the attorney has the control of the prosecution, we think the marshal has no right to order the *ca. sa.* without the authority of the attorney.

2. It is evident that the marshal has no power to enforce payment of the fine, &c., without execution, unless the offender be committed by the Court.

4. It seems to follow, from the natural dictates of justice, that as that part of the Act of Maryland which authorizes the sheriff

to compel the attorney-general to order an execution, is not applicable to the marshal, the correspondent obligation of the sheriff to collect the fines, &c., at all events, (insolvency excepted,) in a case where no execution shall have issued, cannot devolve on the marshal.

5. If it were possible to think that the marshal would be liable in such a case, there is no person substituted for the treasurer of Maryland, to decide the fact of insolvency, so as to discharge the marshal, even in that case.

The next questions arising in this case are, —

1. Whether the Levy Court is bound to repair the jail erected by the United States in this county.

2. If they are, then whether the marshal had a right to apply, to that object, the funds of the Levy Court in his hands, without the order or assent of that Court.

The Levy Court was constituted by the 4th section of the Act of Congress of the 3d of March, 1801, [2 Stat. at Large, 115,] which declares that they shall possess and exercise the same powers, and perform the same duties as the Levy Courts, or commissioners of counties possess and perform.

By the 10th section of the Act of Congress of the 3d of May, 1802, [2 Stat. at Large, 193,] the marshal of the District of Columbia was authorized and directed, with the approbation of the President of the United States, to cause a good and sufficient jail to be built within the city of Washington, and a sum not exceeding \$8,000 was appropriated to that purpose..

The Act of Congress of the 1st of July, 1812, [2 Stat. at Large, 771,] authorized the Levy Court to erect and maintain a penitentiary; to straighten and repair certain roads, and to make new roads; to impose a tax on the county, (excepting the city of Washington,) not exceeding 25 cents on \$100 of the real and personal property, for the aforesaid and all other general county purposes; and repeals all the then existing laws so far as they vested in the Levy Court a power to lay taxes; and they were exempted from all obligation to support the poor of the city of Washington; and were authorized to lay a special tax upon the other part of the county for the support of the poor of such other part. By the same act, the Levy Court is organized anew. The general county expenses and charges, other than for certain roads and bridges out of Georgetown and Washington city, were to be divided equally between that city and the residue of the county, and one half thereof to be paid by the city to the treasurer of the Levy Court; which general expenses were to be ascertained annually by that court and the city.

These are all the provisions of the several acts of Congress, giving powers to the Levy Court of Washington county.

Union Bank of Georgetown v. Eliason.

By the Act of Maryland, November, 1794, c. 53, entitled "An Act for the establishment and regulation of the Levy Court in the several counties in this State," the justices of the county are to meet and adjust the ordinary and necessary expenses of the county, including an allowance for the poor, and roads; and may impose an assessment or rate for necessary repairs of the courthouse, not exceeding £150 a year, and for necessary repairs of the county jail, not exceeding £150 a year.

We do not see, in these laws, any positive obligation on the part of the Levy Court to repair the jail; and we think that no such obligation can be inferred, when we consider that the jail was built by the United States on their land, for the safe-keeping of their prisoners; in the execution of their laws, and of the judgments of their courts; and that it is their property, and may, by them, be converted to any other use than that of a jail.

Being of opinion, therefore, that the Levy Court is not bound to repair the jail, we think the marshal was not authorized to expend their funds, without their authority, upon that object.

The report of the auditor must be reformed according to the principles contained in this opinion, and for that purpose the cause must be referred to him, with power to take any further evidence which each party may offer, (subject to the exception of the other party,) and report to this Court, so that a final order may be made in the cause.

At a subsequent term, to wit, 29th May, 1829, the auditor reported again, in conformity with the opinion of the Court, and found a balance of \$613.33, due from the marshal to the Levy Court.

Mr. Marbury, on the same day, filed exceptions to the report,

1. Because it rejected the common-law fines, and fines imposed under acts of Congress.

2. Because the auditor refused to allow interest on the balance, on the ground that the marshal had, by mistake of the officers of the treasury, applied the money to the use of the United States in repairing the gaol.

These exceptions were overruled by the Court, January 9th, 1830, and judgment rendered for the balance reported. Affirmed by the Supreme Court, 5 Peters, 451.

 UNION BANK OF GEORGETOWN v. JOHN ELIASON.

Non assumpsit in/ra tres annos, is not a good plea to an action against the maker of a promissory note payable sixty days after date. It ought to be *actio non accrevit*.

ASSUMPSIT, against the maker of two promissory notes; each

payable sixty days after date, and indorsed by the firm of E. Eliason & Hersey, and discounted by the plaintiffs for the accommodation of the defendant; one dated March 29, 1814, for \$2,700, and the other, April 26, 1814, for \$1000. After stating the notes and indorsements with the usual averments, the declaration proceeded thus: "By reason whereof and by force of the statute in such case made and provided, the said defendant became liable to pay the said sums of money, in the said notes mentioned, to the said plaintiffs, according to the tenor and effect of the same, and the said indorsements thereon; and being so liable, in consideration thereof, then and there," (that is, on the 26th of April, 1814, the date of the last-mentioned note,) "undertook and promised to pay the same to the said plaintiffs according to the tenor and effect thereof, and the indorsements thereon, whenever afterwards he should be thereto requested." Then followed the usual money counts, all averring the promises to be made "on the same day and year aforesaid;" "yet the said defendant, the said several sums of money herein mentioned, or any part thereof (although often thereto requested, namely, on the day and year aforesaid, at the county aforesaid, and often afterwards,) hath not paid, but the same, or any part thereof, to pay has hitherto wholly refused and still does refuse, to the damage of the plaintiffs in the sum of five thousand dollars," &c.

To this declaration the defendant pleaded *non assumpsit*, and *non assumpsit infra tres annos*, and the plaintiff demurred generally to the last plea, and joined issue upon the first, [*ante*, 629.]

Mr. R. S. Cox and *Mr. Jones*, for the defendant, in support of the plea of *non assumpsit infra tres annos*, contended that the setting out of the two notes, and the concluding averment of liability thereon, (that is, on the two,) and the promise, in consideration thereof, to pay on demand, all necessarily form one count, winding up with the last-mentioned promise, as made in consideration of the premises. The notes are the inducement; the promise the gist of the action. It seems impossible, according to any rule of pleading, to treat the setting forth of the two notes as a distinct count upon each; the concluding promise, founded upon the two, consolidates the two contracts (originally separate and distinct as they were) into one; that is, as the aggregate consideration of the one contract or promise.

The conclusion of the declaration, setting out the breach of the promise, is entirely conformable to this construction of the averments of the declaration; it lays a breach, specifically, of the promise to pay on demand; and, assuming, as the plaintiff's counsel is compelled to do, the time, referred to, to be the date

of the note or notes, it is bad as an assignment of the breach of the written promise contained in the notes. The rule cited from Chitty on Bills, requires that the request and refusal should be laid on a day subsequent to the falling due of the note; the general averment that he has always refused, and still refuses, &c., is common to every declaration; and cannot possibly be understood as fulfilling the rule of pleading referred to.

The cases all show that the general principle is that when the promise is upon a past or executed consideration, the plea is *non assumpsit*; and not *actio non accrevit*. The declaration avers a new promise to pay on demand. The demand must be alleged to be after the day for the payment of the note. "The day and year aforesaid," refers to the day of the date of the note, and therefore avers a breach before the note became payable. Chitty on Bills, 629; *Perkins v. Burbank*, 2 Mass. Rep. 81; *Collins v. Benning*, 12 Mod. 444; S. C. 3 Salk. 227; Selw. N. P. 121; *Gould v. Johnson*, 2 Salk. 422; S. C. 2 Lord Raym. 838; 2 Saund. 63, c, note 6.

Mr. Dunlop and Mr. Key, contrà, relied upon the decision of this Court in the case of *The Bank of Columbia v. Ott's Administrators*, at May term, 1825, [*ante*, 575.] The promise averred in the declaration is a promise to pay according to the tenor and effect of the note; that is, in sixty days after date.

The plea must be good as to all the counts, or it will be bad on demurrer. 1 Chitty on Pl. 522, 533; *Puckle v. Moore*, 1 Vent. 191.

Judgment for the plaintiffs, on the demurrer, 13 May, 1826.

CHARLES MASTERSON v. ZEDEKIAH KIDWELL.

Upon the submission of a cause to arbitration by consent of parties and rule of Court, the arbitrators are not bound to give notice to the parties of the time and place of making their award.

After submitting a cause to arbitration by rule of Court, neither party can revoke his submission without consent of the other.

Notice of the filing of the award may be given to the attorney at law of the opposite party.

Want of notice is no ground of exception, but of a motion to set aside the award.

Quære, whether a motion to set aside an award must not be made within four days after notice of the filing of the award.

This cause was, by consent of the parties and a rule of Court, submitted to arbitrators, who made their award, which was filed, and notice of the filing was given to *Mr. Swann*, the attorney-at-law of the defendant, who filed exceptions to the award,

1. Because the arbitrators made the award at a time and place of which the defendant had no notice.

 Keirll v. McIntire.

2. That before the award the defendant had revoked his submission.

3. That notice of the award was served only upon the defendant's attorney-at-law.

1st. The parties must have notice of every meeting of the arbitrators. *Rigdon v. Martin*, 6 Har. & Johns. 406; Kyd on Awards, 29, 31, 34, 96. No time was given to the defendant to produce his evidence.

2d. Before the award was made, viz. on the 15th of December, the defendant revoked his submission, and gave notice thereof to the arbitrators; notwithstanding which, without any notice to the defendant of their intention to proceed, they made an award on the 20th. Kyd, 112, 113. The submission is only an authority, not a contract. If the submission be by bond, it may be revoked, and the arbitrators cannot proceed; but the party revoking will be liable upon his bond. If the submission be by rule of court, and he revokes, he may be attached, but the arbitrators have no authority to make an award. Kyd, 29, 33.

Mr. Marbury, contra. The want of notice is not the ground of exception, although it may be of a motion to set aside the award; but then it must be supported by affidavit. Exceptions must be for matter apparent on the face of the award. But a motion to set aside the award is now too late. It should be made within four days after notice of the award. *Rigdon v. Martin*, 6 Har. & Johns. 12, 403; Kyd, 29, 34; *Oxley v. Oldden*, 1 Dallas, 430.

Neither party has a right to revoke a submission made under a rule of Court. It would be a contempt of the Court.

Under the Act of Assembly of Maryland, 1785, c. 80, § 11, notice to the attorney-at-law is sufficient.

The parties are not entitled to notice of the time and place of making up their award.

Mr. Swann, produced the defendant's affidavit stating the facts, which he considered as evidence of malpractice of the arbitrators, and moved to amend his exceptions by stating their improper conduct.

But the COURT overruled all the exceptions and ordered the judgment to be entered upon the award. CRANCH, C. J., wishing for time to look at, and consider the papers, gave no opinion.

JOHN W. KEIRLL v. ALEXANDER MCINTIRE.

If a defendant, who is out upon a prison-bonds bond, given upon a *capias ad respondendum*, petitions for the benefit of the Act for the Relief of Insolvent Debtors, and

Keirll v. McIntire.

upon allegations filed is found guilty, in a summary proceeding before a judge who orders him into close custody, and that he be precluded from any benefit under the act, whereupon the debtor is committed to close custody, and afterwards escapes, the creditor at whose suit he was taken cannot maintain an action upon the prison-bounds bond, for that escape.

Quere, whether, if a petitioning debtor be convicted of fraud, upon allegations in a summary proceeding before a judge out of court, the judge has authority to order him into close custody; or whether the judge is merely to refuse to grant him the relief he seeks under the act?

DEBT, on a prison-bounds bond against the surety of Daniel Donohogue, who was taken upon a *capias ad respondendum* at the suit of the present plaintiff, John W. Keirll. Donohogue applied to one of the judges to be discharged under the insolvent act. The plaintiff filed allegations charging the debtor with having disposed of part of his property with intent to defraud his creditors, upon which an issue was made up and tried by a jury, who found the debtor guilty; whereupon the judge ordered "that the said Daniel Donohogue be remanded to close custody, and be precluded from any benefit under the Act of Congress entitled An Act for the relief of Insolvent Debtors within the District of Columbia." After being thus remanded he escaped, and broke the bounds; and the plaintiff brought this action of debt upon the prison-bounds bond, which was dated on the 7th of April, 1824, and in his declaration set forth the bond with its condition, which was in the usual form, and assigned for breach that the debtor (Donohogue) did not keep, remain, and stay within the prison-bounds, but departed therefrom on the 17th of May, 1824, before he had by due course of law been finally discharged from the said prison and bounds.

To this declaration the defendant, after protesting that Donohogue did not break the bounds, as alleged, pleaded specially, setting forth the arrest and commitment of Donohogue upon the *capias ad respondendum*, and the prison-bounds bond; and averring that he did continually keep, remain, and stay within the prison bounds from the time of the execution and delivery of the bond until the 1st of June, 1824, when he was brought before W. C., Ch. Judge of the Circuit Court of the District of Columbia, upon allegations filed against him by the plaintiff as a creditor, charging that he had disposed of part of his property with intent to defraud his creditors, upon which allegations issues were made up and tried by a jury, who found him guilty; whereupon it was ordered by the judge that he should be remanded to close custody; and be precluded from any benefit under the act; and that he was so remanded, and committed to close custody in the jail of Washington county, and was not any longer entitled to the benefit of the prison rules or limits, for which the bond was

given, nor to any benefit under the act ; and that the bond was no longer of any force or effect to obtain for the said Daniel the benefit of the prison bounds, nor was the defendant any longer liable or bound that the said Daniel should thereafter keep within the same.

To this plea the plaintiff replied that Donohogue was not, after the making and delivery of the bond, remanded to close custody, or in any manner seized or taken or rendered or committed to close custody in manner and form as the defendant in his plea alleged, in virtue, or execution, of the writ or process in the condition of the bond mentioned, or in any manner at the suit or instance or by the procurement of the plaintiff, under or by virtue of the said writ or process, or in execution thereof ; "and this the plaintiff is ready to verify," &c.

To this replication the defendant rejoined, that the said Daniel was committed to close custody by the order of the said judge, as this defendant hath already in pleading alleged, passed upon the finding of the jury upon the issue joined on the allegations filed against the said Daniel by the plaintiff as alleged by the defendant in his plea aforesaid, and upon no other cause, process, or order ; "and so the defendant says that the said commitment last mentioned was by the procurement of the plaintiff, and in virtue of the original *capias* in the said condition mentioned ; and this he is ready to verify."

To this rejoinder the plaintiff demurred specially, and assigned the following reasons :

1. That the defendant, in rejoining to the plaintiff's replication as aforesaid, hath not taken issue upon, or in any manner traversed or confessed and avoided the matter by the plaintiff above in replying pleaded as aforesaid.

2. That the said rejoinder is a departure from the issue upon the matter pleaded by the plaintiff in his said replication ; and also from the matter of the defendant's said plea.

3. That the matter by the defendant above in rejoining pleaded is wholly immaterial, and impertinent to the matter by the said plaintiff above in replying pleaded.

4. That the said rejoinder is a mere repetition of the matter of the plea, and offers to put the same matter in issue, without in any manner traversing or confessing and avoiding the matter of the said replication.

5. That the said rejoinder is altogether immaterial, informal, and vicious.

The defendant joined in demurrer.

Mr. Key, for the defendant, contended, that the liberty of the prison bounds was one of the benefits of the Insolvent Act of

March 3d, 1803, [2 Stat. at Large, 237,] it being given by the 16th section of that act; and that when the defendant ceased, by law, to enjoy that benefit the bond ceased to be obligatory; and when the debtor was committed to close custody by the order of the judge the bond was of no use. The liberty and the bond are correlative; neither can exist without the other. The commitment being at the instance of the plaintiff, he ought not to have the benefit of both. If he relies upon the commitment he must relinquish the bond. His remedy is against the marshal for an escape.

THRUSTON, J., requested to hear the other side.

Mr. Wallach and *Mr. Jones*, for the plaintiff. The commitment and the order for commitment to close custody were illegal and void. The judge had no jurisdiction or power to order the commitment. The only judgment which the judge could give was to order that the debtor's petition should be dismissed. The penalty is merely negative. The benefit from which he is to be precluded, is, what is vulgarly called "the benefit of the act," that is, a personal discharge from arrest for any debt contracted before the discharge. That was what he was seeking and from which he was to be precluded; it was not what he already enjoyed. It was future benefit, which was to be denied to him, not what he already had.

The party may be required to answer interrogatories, not to convict him of a crime or a forfeiture, but to prevent him from obtaining that which he is seeking. The judge acts ministerially. He has no power to commit. He has no power in this summary proceeding which is not expressly given to him by statute.

The COURT (CRANCH, C. J., *contrà*,) rendered judgment for the plaintiff on the demurrer.

WILLIAMS *et al.*, Heirs of Walter B. Smallwood, *v.* BARRETT.

The widow is not entitled to dower in lands of which her husband died possessed, but to which he had no legal title, although he had paid the whole purchase-money. A guardian is liable for waste, and entitled to credit for permanent improvements, and the education of the children.

BILL IN EQUITY by the heirs of Walter B. Smallwood against Richard Barrett, who married the widow of Smallwood and the mother and guardian of his heirs, whom he, Barrett, has survived.

It states that Smallwood, in his lifetime contracted to purchase certain land of Murdoch, and held the same, under that contract, at the time of his death, not having received a legal conveyance of the same. That the annual value of Smallwood's real estate was ascertained by the Orphans' Court in 1816. That Barrett,

in settling his guardianship account with the Orphans' Court, deducted one third of the rents received of the real estate, including that purchased of Murdoch, in right of his wife's dower in the same, amounting to \$733.33, which he had no right to do, because she was not entitled to dower in lands of which her husband was never seized in law of an estate of inheritance during the coverture.

The bill also charges Barrett with waste. It avers that, upon a bill filed by Murdoch's heirs, the contract for the sale of the land to Smallwood was rescinded, and the purchase-money refunded to J. W. Baker, the administrator *de bonis non* of Smallwood, and in that suit the waste was considered by the Court equivalent to fourteen years' interest of the purchase-money, (which was \$1176.93,) refunded by Murdoch's heirs. The bill calls upon Barrett to account for the rents and the waste; and prays injunction against Baker, to restrain him from paying any part of the purchase-money, (\$1,176.93) to Barrett, who had brought suit against him for one third of that purchase-money.

The cause having been set for hearing upon the bill, answer, replication, exhibits, depositions and other evidence in the cause, The principal question argued was, Whether the widow was entitled to dower in the lands purchased by her husband of Murdoch, and of which her husband was possessed at the time of his death, but to which he had no legal title, although he had paid the purchase-money.

Mr. Redin, for the plaintiffs, to show that she was not entitled to dower, cited the following authorities: 1 Maddock, 365, 371; *Darcy v. Blake*, 2 Sh. & Lefroy, 388, 389; *Chaplin v. Chaplin*, 3 P. Williams, 229; *Attorney-General v. Scott*, Ca. Temp. Talbot, 138; *Goodwin v. Winmore*, 2 P. Williams, 525; *Dixon v. Saville*, 1 Br. C. C. 326; *Burgess v. Wheate*, 1 W. Bl. 123, 138; *Claiborne and Wife v. Henderson et al.* 3 Hen. & Mun. 322, 365; Kilty's Report of British Statutes in force in Maryland, 208; *Stevens v. Richardson*, 6 Har. & Johns. 156, 162, An. 1-24.

Mr. R. P. Dunlop, for the defendant, cited the following authorities: 1 Maddock, 362; Sugden's Vendors, 120; 1 Cruise, on Real Estate, 490, 2 Tucker's Blackstone, 131; *Banks v. Sutton*, 2 Cox's P. Williams, 632, 700, 719; 1 Fonblanque, 22, note; 2 Bk. Com. 337; *Burgess v. Wheate*, 1 W. Bl. 160; *Shoemaker v. Walker*, 2 Serg. & Rawle, 554; *Collins v. Torry*, 13 Mass. R. 227; *Dixon v. Saville*, 1 Br. C. C. 326; *Fish v. Fish*, 1 Connect. Rep. 559; *Snow v. Stevens*, 15 Mass. Rep. 278; 6 Johnson, 290; *Coles v. Coles*, 15 Johns. 319; 5 Johns. Ch. Rep. 452, 482, 492; 1 Cruise, 161; *Hamilton v. Mohun*, 1 P. Williams, 118; 1 Cruise, tit. 12, c. 3.

United States v. Gray.

In settlement of Barrett's guardianship account, in right of his wife, with the Orphans' Court, that court allowed him to retain one third of the rents of the land contracted for but not conveyed to her husband. To show that such settlement was not conclusive, the counsel for the plaintiffs cited 1 Har. & Johnson.

This Court made the following interlocutory decree, on the 24th of May, 1826, namely,

That the auditor take and state an account of all moneys received by the defendant, or for which he is chargeable as guardian, or in right of his late wife Sarah, who was the widow and administratrix of Walter B. Smallwood, deceased, and guardian of his infant children; and state the said guardianship account, giving to the said Barrett, in the said account, all proper credits.

But the COURT was of opinion that his said wife was not entitled to dower in lands to which the said W. B. Smallwood had not, at some time during the coverture, a legal estate; but that he is entitled, in right of his wife, to her distributary share of \$1,176.93, being the purchase-money heretofore ordered by this Court, in the suit of *Smallwood v. Murdoch*, to be refunded by the representatives of Murdoch, to the administrator *de bonis non* of Smallwood, and which this Court, by a decree in that cause, ordered to be distributed as personal assets of the said Smallwood. That the auditor, in that account, charge the said Barrett with the value of the waste done by him upon the lands of the heirs of the said Smallwood, and give him credit for all permanent improvements made by him thereon; and for the maintenance and education of the children of the said Smallwood, taking into consideration the kind of maintenance and education which they actually received, and the value of their services.

UNITED STATES v. HENNY GRAY.

In a prosecution for keeping a disorderly house, the general character of the house is in issue, and may be given in evidence.

A house kept for the meeting of men and women for illegal and obscene purposes, or for the purpose of enticing young girls there for debauchery, is a disorderly house.

INDICTMENT for keeping a disorderly house.

Upon the trial, the COURT (CRANCH, C. J., doubting,) said the general character of the house was in issue, and permitted the attorney of the United States to give evidence of its general reputation.

The COURT also (*nem. con.*) instructed the jury that if they should be satisfied, by the evidence, that the defendants kept a house for the meeting of men and women for illegal and obscene

Botelor v. The Corporation of Washington.

purposes, or for the purpose of enticing young girls there for debauchery, the indictment was supported; and that it was not necessary that the United States should prove all the circumstances laid in the indictment by way of aggravation.

HENRY COUMBE v. JAMES NAIRN.

The defendant, against whom a judgment has been rendered by a justice of the peace, cannot maintain an appeal from that judgment after having superseded it by confessing a new judgment, with sureties, and six months stay, according to the provisions of the Act of Assembly.

THIS was an appeal from the judgment of a justice of the peace. The defendant had superseded the judgment by confessing a new judgment for the same amount, with sureties, and thereby obtained a stay of six months, as provided by the Maryland Act, 1791, c. 67.

The COURT (MORSELL, J., absent,) was of opinion that the original judgment was merged in the new judgment, and could not now be the subject of appeal.

Appeal dismissed with costs.

BOTELOR v. THE CORPORATION OF WASHINGTON.

Rye-chop is not "provision, nor an article of food" within the meaning of the by-law of October 6, 1802, which makes it unlawful for any person "to buy up any provision or article of food coming to market."

To constitute the offence, it is not necessary that there should be a market actually holding at the time of the purchase.

APPEAL from the judgment of a justice of the peace against the appellant for forestalling rye-chop coming to market, contrary to the by-law of the 6th of October, 1802.

The by-law provides "that no person shall buy any provision or articles of food in the market, and during the market hours aforesaid, for the purpose of selling the same again in the said market, or in any part of the city; nor shall any person out of the market buy up any provision or article of food coming to said market, under the penalty of six dollars for every offence."

The COURT (MORSELL, J., absent,) decided that rye-chop (which was food for horses,) was not "provision" nor an "article of food" within the meaning of the by-law. (Burch's Digest, p. 119, art. 9.) And that "coming to market" meant, on its way to the market-place, with intent to be there offered for sale, in

Murray v. Beck.

market hours ; and that it was not necessary that there should be a market actually holding at the time of the purchase, in order to constitute the offence.

CROSS v. BLANFORD.

If the justice of the peace had not jurisdiction of the cause, his judgment may be reversed, upon appeal, although the cause was tried before him by a jury.

THIS was an appeal from the judgment of a justice of the peace in a cause tried before him by a jury, under the act of March 1st, 1823, [3 Stat. at Large, 743,] extending the jurisdiction of justices of the peace, &c.

The suit was brought upon an account for damages sustained by Blanford, the plaintiff below, by reason of false imprisonment, at the instance of the defendant Cross. There was a trial by jury, before the justice. The defendant objected to the jurisdiction of the justice because the real cause of action was a *tort*, the damages being only an incident. The justice stated the facts in the nature of a bill of exceptions.

The COURT (MORSELL, J., absent,) was of opinion that, although the verdict of the jury was conclusive as to the facts of the case, yet this Court had a right to look into the facts upon a question of jurisdiction ; and having done so, and being of opinion that the real ground of action, before the justice of the peace, was a *tort*, they reversed the judgment, with costs.

THOMAS MURRAY v. JOSEPH W. BECK.

If goods be taken in execution and replevied by a third person, the Court, upon the return of the writ of replevin, will order a return of the property upon the usual *retorno-habendo* bond.

REPLEVIN.

Mr. Morfit, for the defendant, upon the return of the writ, moved for a return of the property. The defendant was a constable, and had levied an execution on a hackney-coach and horses, in the possession, and as the property, of Michael Murray. His brother Thomas (the plaintiff,) sued out this writ of replevin, claiming title to the property under a bill of sale from Michael, which was, in fact, executed three days after the *fi. fa.* came to the hands of the defendant, but was ante-dated fifteen days, with the confessed intention to avoid this execution and to secure a debt due from Michael to Thomas.

Johnson v. Glover and Riggs & Gaither v. Barron.

The COURT ordered a return of the property upon the usual *retorno-habendo* bond. MORSELL, J., *contrà*, being of opinion that the Maryland Act of 1785, c. 80, § 14, did not apply, nor authorize a return in such a case, where an officer, acting under an execution, is defendant in replevin. *Ideo quære*.

JOHN ELLIOT v. WILLIAM HAYMAN.

The certificate of a magistrate who takes a deposition of a witness, upon his affirmation, in Pennsylvania, that the witness was conscientiously scrupulous of taking an oath, is sufficient evidence of that fact to admit the deposition to be read in evidence in this Court.

The Court will not permit persons skilled in comparison of handwriting to prove that the body of the certificate of the magistrate, to a deposition, is not in his handwriting.

A DEPOSITION was offered, in evidence, by the plaintiff's counsel, which was taken upon the solemn affirmation of the witness, who, the magistrate certified, was "conscientiously scrupulous of taking an oath."

Mr. Marbury and Mr. R. S. Cox, for the defendant, objected that it did not sufficiently appear to the Court, "by testimony," that the deponent "is one of those who profess to be conscientiously scrupulous of taking an oath," according to the provisions of the constitution of Maryland, as amended by the act of November, 1797, c. 118.

The COURT (CRANCH, C. J., *contrà*,) overruled the objection, being of opinion that the certificate of the magistrate was sufficient evidence of that fact.

The defendant then offered to examine persons skilled in the comparison of handwriting, to prove that the body of the certificate of the magistrate was not in his handwriting.

But the COURT (*nem. con.*) refused to permit them to be examined.

JOHNSON v. GLOVER *et al.*

AND

RIGGS & GAITHER v. WILLIAM H. BARRON.

A *scire facias* is not necessary to revive a judgment, if a *fi. fa.* has been issued and returned.

But if executions are taken out to lie in the office, they must be renewed every year.

UPON the return of a *fieri facias* issued on the 25th of October, 1823, Mr. Morfit, for the defendant, in the case of Riggs & Gai-

Johnson v. Glover and Riggs & Gaither v. Barron.

ther v. Barron, moved to quash the writ because more than a year had elapsed since the last preceding writ of execution had been issued, which was in April, 1822, and there had been no *scire facias* to revive the judgment.

The judgment was rendered on the 14th of January, 1820, upon which a *fieri facias* was issued on the 11th of December, 1820, which was returned *nulla bona*. An *alias fi. fa.* was issued on the of October, 1821, also returned *nulla bona*. A *pluries fi. fa.* was issued in April, 1822, which was not returned; and the present *fi. fa.* was issued, as before stated, on the 25th of October, 1823, and returned levied on a slave, "and enjoined."

Mr. Morfit, for the defendant, cited *Booth v. Booth*, 1 Salk. 322; *Aires v. Hardress*, 1 Str. 100; *Belloes v. Hanford*, 1 Rolle, 104; *Cook v. Bathurst*, 2 Shower, 235; *Vincent's case*, Comb. 346; 2 Tidd, 1004; *Dacy v. Clinch*, 1 Sid. 53; Bac. Ab. Execution, H.

Mr. Redin and Mr. R. P. Dunlop, for the plaintiff, cited *Blayer v. Baldwin*, 2 Wils. 82; S. C. Barnes, 213; *Smith v. Lewis*, 2 Serg. & Rawle, 142, 154; 2 Tidd, 1054; 2 Saund. 68, E.; Id. 72, F.

Mr. Jones, for the defendant, in the case of *Johnson v. Glover et al.*, contended, that, as the execution which was issued in that case in April, 1823, had been returned "countermanded," and no further proceeding until the issuing of the present writ, returnable to December term, 1824, this writ was issued irregularly, without *scire facias*, and ought to be quashed.

The COURT, having taken time to consider, until May term, 1826, CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., absent.)

The question is, whether the omission to renew the execution within a year after April, 1822, without, in fact, entering up the continuances upon the roll, made it necessary to sue out a *scire facias* to revive the judgment.

It is clear that by the English practice for three centuries, if a *fi. fa.* be taken out within a year after judgment and returned, the plaintiff may at any time afterwards have a new execution without a *scire facias*. And that an *elegit* may be taken out at any time, and the continuances entered up. 2 Inst. 469, 470, 471; Co. Lit. 290 b; *Herbert's case*, 3 Co. 12 a; *Welden v. Greg*, 1 Sid. 59; *Dacy v. Clinch*, 1 Sid. 53; *Blayer v. Baldwin*, 2 Wils. 82; *Vincent's case*, Comb. 346; Bro. Parl. 29; *Booth v. Booth*, 6 Mod. 288; S. C. 1 Salk. 322; *Motins v. Welden*, 1 Keble, 159; Clift's Ent. 840; *Officina Brevium*, 96; *Aires v. Hardress*, 1 Str. 100; *Michell v. Cue et ux.* 2 Burr. 660; 3 Salk. 321, pl. 8; *Withers v. Harris*, 2 Ld. Raym. 208; *Seymore v. Green-*

United States v. Wade and Young.

well, Carth. 283; *Harris v. Woolford*, 6 T. R. 617; *Doe v. Dolman*, 7 T. R. 618; *Belloes v. Hanford*, 1 Rolle Rep. 104; *Cook v. Bathurst*, 2 Shower, 235; *Low v. Beart*, Barnes, 210; 1 Tidd, 165; *Hardisty v. Barny*, 2 Salk. 598; *Atwood v. Burr*, 7 Mod. 5; *Brown v. Babington*, 2 Ld. Raym. 883; *Mellor v. Walker*, 2 Wms. Saund. 1; *Blayer v. Baldwin*, Barnes, 213; *Waller's case*, 3 Leon. 44; 2 Tidd, 1051, Ed. 1812; *Gonnigol v. Smith*, 6 Johns. 106; *Lewis v. Smith*, 2 Serg. & Rawle, 142; *Craig v. Johnson*, Hardin's Rep. 520.

This practice, so long established in England, (even before the first emigration to this country,) and so convenient, is opposed only by the letter of Mr. Harris, the clerk of the Court of Appeals in Maryland, to Mr. Key, dated February 3d, 1825, as follows:—

"The practice in the late General Court always was, and it is so in the present Court of Appeals, that, in order to keep a judgment alive, (where an execution has issued thereon,) to renew it, if not to every term, at least within a year and a day of the former execution. There are no continuances entered on the roll, as in England. If no execution has issued within a year and a day of the preceding execution, a *scire facias* must be issued; the judgment being considered out of date."

If there are not reported cases in Maryland upon this point, the long-settled practice in England, before the first settlement of Maryland, and perhaps the universal practice in the other States, would induce a belief that the law was otherwise. Mr. Harris, however, does not put the case of a *fi. fa.* returned "*nulla bona.*"

The COURT, therefore, (THRUSTON, J., absent,) said:—

That where an execution has been issued within the year and day, and shall have been returned by the marshal, it is not necessary to renew the execution, from year to year, to keep alive the judgment, but the plaintiff may have a new execution at any time without a *scire facias*. But where an execution is ordered to be made out and lie in the clerk's office, and shall not have been delivered to the marshal, and returned, the order for the renewal of the execution must be made within the year and day after the last order for renewal; or the judgment must be revived by *scire facias*.

UNITED STATES v. JUDSON WADE AND DAVID YOUNG.

If two be indicted jointly for assault and battery, the wife of one of them cannot be a witness for the other, although they sever in their pleas.

THE defendants were indicted jointly for assault and battery upon Joseph Fagan, and severally pleaded not guilty.

Mr. Key, for the defendants, offered to examine the wife of the defendant *Young*, as a witness for the other defendant, *Wade*.

But the COURT (*nem. con.*) refused; and said, if *Young* himself could not be a witness, his wife could not; and cited the case of *Rex v. Fredick & Tracy*, 2 Str. 1095.

Verdict guilty.

Mr. Key and *Mr. Frost*, for the defendant *Wade*, moved for a new trial, because the Court had rejected the testimony of *Young's* wife; and contended that if the defendants had been tried separately, as they had a right to be, her testimony would have been competent in behalf of *Wade*, and that having pleaded separately, there was the same reason for admitting it, as to *Wade*, as if they had been tried separately.

But the COURT refused the new trial. See the *Commonwealth v. Eastland et al.* 1 Mass Rep. 15, and 5 Esp. 107.

DANIEL HOMANS v. G. COOMBE, Garnishee of Zantzinger.

The Court will set aside a judgment against the garnishee, obtained at a former term by surprise, and will quash the execution thereon issued.

THIS was an attachment issued by way of execution upon a judgment against *Mr. Zantzinger*, and the marshal returned that he had "attached credits in the hands of *Griffith Coombe*, and summoned him as garnishee in the presence of" D. B. and B. O. T., July 28, 1824.

At the return of the writ, *Mr. Coombe*, the garnishee, being called, and not appearing, judgment of condemnation was rendered against him at December term, 1824, for the whole amount due from the defendant, *Mr. Zantzinger*. The writ of attachment issued under the Act of Assembly of Maryland, 1715, c. 40, does not state any particular sum as being in the hands of the garnishee, nor does it even name a garnishee. It commands the sheriff to attach the goods, chattels, and credits of the defendant to the value of the debt, and have them before the Court at the return of the writ, to be condemned to, and for the use of, the plaintiff, unless the defendant shall show cause to the contrary; and to make known to the person in whose hands or possession the goods, chattels, and credits shall be attached, to be and appear at the Court, at the return day of the writ, to show cause why the same should not be condemned, and execution thereof had as in other cases of recovery and judgment.

By the 4th section of the act it is provided, "that no sheriff shall levy, by way of execution as aforesaid, against the said

garnishee or garnishees, any more than the plaintiff's debt and costs, nor against any garnishee or garnishees, than what the said plaintiff in the said action shall make appear to the said respective courts, to be of the said goods, chattels, and credits of the said defendant in each respective garnishee or garnishees' hands, together with such costs only as the garnishee or garnishees shall put the plaintiff to, by denying him or themselves to be indebted to such defendant, and contesting the same."

At the time of the judgment against Mr. Coombe, the garnishee, there was no evidence before the Court to make appear what goods, chattels, or credits were in his hands.

Mr. Key now moved to set aside the judgment against Mr. Coombe, as having been obtained irregularly and by surprise; and produced the affidavit of Mr. Coombe, denying that he ever had any money or property of the defendant in his hands or possession; that knowing that fact, and believing that no person could aver or prove that he had, and that no judgment could be rendered against him without proof, he thought it unnecessary to take any steps for his defence, and the subject passed out of his mind, &c. There were also other corroborating affidavits.

The COURT, at a subsequent term, set aside the judgment against the garnishee, as having been obtained by surprise, and quashed the execution.

BAKER & DYER v. GLOVER.

A Court of equity will grant an injunction to stay execution upon a judgment obtained against a garnishee by surprise, and will continue it till final hearing.

THIS was a bill for an injunction to stay proceedings upon a judgment against the complainants as garnishees of Edward Smith by default, and for general relief.

The bill stated, that in February, 1818, the defendant Charles Glover, issued an attachment against Edward Smith, under the Maryland Act of 1795, c. 56, which was returned, "Laid in the hands of Elizabeth Baker, John R. Dyer, Edward Dyer, and Thomas Munroe, and summoned them as garnishees." That at the time of the service of the attachment, neither of the garnishees had any goods or chattels of Smith in their possession, and that neither of them was indebted to him. That relying on that fact, and being ignorant of the law and the proceedings of courts, they failed to appear at the return of the attachment, whereby they are informed that judgment of condemnation by default was entered against them as garnishees for \$260 and costs, at June

term, 1818, and that execution thereupon is in the hands of the marshal who is about to levy on the property of the complainants.

That the proceedings at law were illegal and void inasmuch as the judgment was rendered against one of the complainants by the name of Elizabeth, when her name was Catharine; that there is no return on the *capias* against Smith, and no short copy of the cause of action set up at the court-house door. The bill then prays an injunction, and for general relief.

An injunction was granted in vacation by THRUSTON, J. The answer denies that the complainant Baker was not indebted to Smith. It avers that the defendant believes that the proceedings at law upon the attachment were correct and proper, and that a short note of the cause of action was set up at the court-house door, which the defendant himself saw. As to that part of the bill which complains that no return was made on the *capias* against Smith, the defendant answers, that before the *capias* was issued Smith had absconded and has not returned.

Mr. Morfit, for the defendant Glover, contended that by the rules of equity an injunction cannot be granted to stay execution upon a judgment by default. *Graves v. Hauldich*, 2 Price, 147; Hammond's Eq. Dig. 503. That the complainant had a complete remedy at law, under the Maryland Act of 1787, c. 9, § 6, by a motion to set aside the judgment for surprise or irregularity; and to quash the execution. *Cheetham v. Tillotson*, 4 Johns. 500; 1 Johns. Cases in Error, 429. That therefore there was no equity in the bill.

Mr. Key then moved the Court to quash the execution, and to set aside the judgment at law against the garnishees, rendered at June term, 1818, for irregularity. 1. Because there was no return of the *capias* against Smith. 2. Because there was no short note set up at the court-house door. 3. Because there was no evidence by which "to make appear to the Court" what "goods, or chattels, or credits of the defendant were in each respective garnishee's hands," according to the provisions of the 4th section of the Act of Maryland, 1715, c. 40.

The COURT ordered the injunction, and the motion to set aside the judgment and quash the execution, to be continued till the final hearing upon the cause in equity.

NOTE. Glover died and the cause was abated.

Dyer v. Coyle.

PATRIOTIC BANK v. NATHANIEL FRYE.

A bookkeeper, who has given a credit to A. instead of B., by mistake, is a competent witness to prove the mistake, without a release.

Only what a witness recollects is competent evidence.

A SUM of \$100 had been entered to the credit of the defendant, in his bank-book by Mr. Bradley, the plaintiffs' bookkeeper, and he was called to be sworn and examined as a witness for the plaintiffs to prove the mistake and that the credit ought to have been given to the Franklin Insurance Company, who had, in fact, deposited the money.

*Mr. Cox*e and *Mr. Key*, for the defendant, objected that the witness was interested, because he is chargeable for the loss if the plaintiffs should not recover it of this defendant.

But the COURT (CRANCH, C. J., doubting,) permitted him to be examined, without a release from the plaintiffs.

The witness, when examined, had no distinct recollection that the deposit, on the 14th of December, 1822, was made by the Franklin Company, although the original entry of that deposit, to the credit of that Company, was in his handwriting.

Mr. Key, for the defendant, contended, and the COURT decided, that the testimony of the witness, as to that fact, is not evidence unless the witness has a recollection of the fact, his memory being refreshed by his own memorandum.

W. B. DYER v. F. COYLE.

Goods distrained by a collector of taxes in the city of Washington, cannot be replevied without a special order from a justice of the peace, as required by the Maryland Act of 1790, c. 53.

REPLEVIN for goods distrained by a city collector of taxes in Washington.

Mr. Wallach, for the defendant, moved the Court to quash the writ, or that the Court would direct a *non-pros* to be entered; because the goods were distrained by the city collector for taxes due to the Corporation of Washington.

By the twelfth section of the amended charter of Washington, of May 15th, 1820, it is enacted that the provisions of the Acts of Assembly of Maryland, (1785, c. 34, and 1790, c. 53,) relating to the right of replevying property taken in execution for public taxes, shall apply to all cases of personal property taken by distress to satisfy taxes imposed by virtue of that act.

Bank of Washington v. Peirson and Brent.

The Maryland Act of 1785, c. 34, prohibits replevin of goods taken in execution for taxes and public dues, but the Act of 1790, c. 53, permits it upon application to a magistrate and his warrant therefor. No such warrant had been obtained.

Mr. Smith, for the plaintiff, *contrà*, relied upon the fact that the property, for which the tax was laid, was not liable to taxation.

The Court (*nem. con.*) directed the *non-pros* to be entered.

 NEWTON v. WEAVER AND BURDICK.

In a joint action against two defendants, if one only be taken on the first writ, and the other be taken on a subsequent writ, and the plaintiff, not knowing that this other had been taken, alters his declaration by stating that he had not been taken, and proceeds to judgment against the defendant first taken; the Court will, at a subsequent term, permit the judgment to be set aside and the declaration to be restored to its original form, and the cause to proceed as a joint action against both.

THIS was originally a joint action against Weaver and Burdick. Burdick was first taken, and the writ returned *non est* as to Weaver; but the latter was taken on the second or third writ, before May, 1825.

At the last term, namely, December term, 1825, *Mr. Wallach*, for the plaintiff, supposing that Weaver had not at that time been taken, altered his declaration by inserting that fact, and by declaring against Burdick alone, who thereupon confessed judgment.

Mr. Wallach, now, upon motion, was permitted by the Court (CRANCH, C. J., *contrà*), to restore his declaration to its original form, as a declaration against both defendants, and ordered the judgment to be set aside and the cause brought back to this term and consolidated with this, against Weaver.

CRANCH, C. J., thought that the Court ought not now to permit an alteration of the record of the last term for the purpose of making the judgment erroneous, merely because the counsel of the party was so negligent as erroneously to state a fact upon the record, the truth of which he had the means, by ordinary attention, of ascertaining. The judgment was correct according to the record.

 THE PRESIDENT AND DIRECTORS OF THE BANK OF WASHINGTON
v. JOSEPH PEIRSON AND R. Y. BRENT, EXECUTORS OF R. BRENT.

An authority to indorse notes need not be under seal. A power from R. B. to sign, in his behalf, any note for the renewal of notes, of which he was then the drawer or indorser, is a continuing power to indorse notes subsequently given, to renew notes indorsed by the attorney for his principal.

Bank of Washington v. Peirson and Brent.

The existence of the original note indorsed by the principal, may be proved by parol, without producing it, it having been cancelled and given up to the maker. If the principal authorize his agent to receive notices for him, the authority ceases with his death; a notice given to the agent after the death of the principal, will not bind his executors.

ASSUMPSIT against the executors of the indorser of T. L. Washington's notes.

The name of R. Brent, the defendant's testator, was written on the back of the notes by J. H. Reily; and to show his authority to indorse for Mr. Brent, the plaintiffs produced a written paper, not under seal, in the following words: "I hereby authorize and empower Mr. John Reily, of the Bank of Washington, to sign for me and in my behalf any note for the renewal of notes, in the said bank, of which I am the drawer or indorser. Given under my hand this 9th day of August, 1818. Rob. Brent. Witness: Robert Brent, William Brent."

The COURT (*nem. con.*) decided that it was not necessary that the power to indorse should be under seal; but that the paper might be read to the jury as part of the evidence to show the authority of Mr. Reily to indorse.

The COURT also decided, (CRANCH, C. J., *contrà*,) that this was a continuing power to indorse notes subsequently given to renew notes indorsed by Mr. Reily in the name of Mr. Brent, to renew notes indorsed by Mr. Brent himself.

The COURT also decided, (MORSELL, J., *contrà*,) that parol evidence might be given of the existence of a note indorsed by Mr. Brent in the Bank of Washington, previous to the authority given to Mr. Reily; and that the present note was given to renew a note, given to renew a note given to renew that note so indorsed by Mr. Brent himself; evidence having been given that the note with Mr. Brent's original indorsement had been cancelled and given up to T. L. Washington, the maker, who was dead, and no administration was ever taken upon his estate; that he had no wife nor child; that his brother lived with him at the time of his death, but is also dead, and it did not appear who was in possession of Mr. T. L. Washington's papers; nor that the plaintiffs ever made any inquiry for that note, so as to produce it at the trial.

The COURT also decided, (THRUSTON, J., *contrà*,) as they had twice before decided, namely, once in this cause, a few days before; and once in another cause between the same parties, at December term, 1824, [*ante*, 517,] that notice, of non-payment, given to Mr. Reily, after the death of Mr. Brent, did not excuse the bank for not giving notice at the late dwelling of the deceased, nor for not inquiring whether any administration had been

Riggs v. Tayloe.

taken upon his estate, &c. That the defendants, although they had not proved the will and obtained letters testamentary, at the time the notes fell due, yet, as they were executors, they were entitled to notice; and notice to Mr. Reily was not notice to them; they never having authorized him to receive notice for them.

Mr. Wallach, for the plaintiffs.

Mr. Swann and *Mr. Worthington*, for the defendants.

Verdict for plaintiff, \$1,001.75. Bills of exception were taken, but no writ of error.

UNION BANK OF GEORGETOWN *v.* GEORGE B. MAGRUDER.

If the maker of a promissory note die before the note becomes payable, and the indorser administers upon the estate of the maker, no demand or notice is necessary to charge the indorser.

ASSUMPSIT against the indorser of George B. Magruder's note for \$643.21, dated November 8th, 1817, and payable to the defendant or order, seven years after date, with interest. The maker died in August, 1823, the defendant became his administrator before the note became payable. No demand of payment of the note was made upon the defendant as administrator of the maker.

Mr. Key and *Mr. Dunlop*, for the plaintiff, contended that it was not necessary to make any such demand in order to charge the defendant as indorser. It could be of no use, as the defendant himself was the party bound to pay, and could not be injured by want of notice.

Mr. R. P. Dunlop and *Mr. Coxe*, *contrà*, contended that the obligation of the indorser was only conditional, &c.

The COURT (CRANCH, C. J., *contrà*,) was of opinion that no demand of payment of the note was necessary upon the defendant as administrator of the maker, to charge the defendant as indorser of the note.

Reversed by the Supreme Court of the United States. 3 Peters, 87.

ELISHA RIGGS *v.* JOHN TAYLOE.

If a written contract be not lost nor destroyed, but only "mis-laid," secondary evidence will not be admitted, although the party makes oath that "he has searched for it among his papers repeatedly and cannot find it."

Upon a second trial, the Court will not permit improper evidence, if objected to, to be given, although it had been received at the first trial without objection.

Testimony of conversations, preliminary to a written unconditional contract is ad-

Riggs v. Tayloe.

missible and competent on a count upon a written conditional contract which is lost, destroyed, or mislaid, although the witness does not recollect the terms of the written contract, nor how it was expressed, but states his impression and belief.

Money paid upon an uncertain contingency, which both the payer and payee expected would happen, but which did not happen, may be recovered in an action for money had and received.

If the contract be to purchase the defendant's bank-stock at par, with so much of the next dividend as was then supposed to have been earned, estimated at three per cent. and it turns out that nothing was earned, there is an implied *assumpsit*, on the part of the defendant, to refund the three per cent.; and so much of the contract as relates to the advance of three per cent. is executory, even after the purchase-money has been paid.

ASSUMPSIT, upon a special written contract; and for money had and received.

In the first count the plaintiff states that on the 15th of May, 1818, it was agreed between the plaintiff and defendant, that the defendant should sell to the plaintiff his stock in the Central Bank of Georgetown, being 7462 shares, at par, and represented to the plaintiff that the stock was of that value, and that a dividend of four per cent. would be made on the said stock at the next ensuing first Monday of July, and insisted that if he should part with his said stock at par, the plaintiff should advance and pay him so much of the said dividend as had been then earned by the said bank; and the plaintiff confiding in the defendant's representation and believing that the said dividend of four per cent. would be made upon the said stock, did agree to advance the supposed earnings of the said stock, which said supposed earnings, according to a calculation then made by the said parties, amounted to three per cent.; and a memorandum of the said agreement was then and there reduced to writing and signed by the said parties; and that it was further agreed in and by the said writing that the plaintiff should be at liberty to confirm or disannul the said agreement at any time within days from the date of the same; that the plaintiff, confiding in the statements and representations of the defendant as aforesaid, and believing that the said dividend of four per cent. would be made as aforesaid, on the day next following the date of the said agreement, did agree to confirm and ratify the same, and did agree to buy of the defendant his said bank-stock, at the par price aforesaid, and did agree to advance to the defendant the supposed profits which the said stock had earned to the time of the said agreement, that is to say, three per cent. upon the amount of the said stock; that the stock was transferred by the defendant to the plaintiff who paid for it at the par price, and did further advance and pay to the defendant the sum of \$1,902; being the supposed earnings of the said bank at the time of the said contract; that at the time of the contract the bank had made no

profit upon which any dividend could be declared, and that it was not competent for the said bank, on the first Monday of July, then next following, to declare any dividend upon the said stock; of all which premises the defendant had notice; "by means whereof he became liable and bound to refund to the said plaintiff the said sum of money so advanced to him for the said supposed earnings of the said bank, and the said defendant being so liable, in consideration thereof," promised, &c.

The second count was for money had and received.

This cause was first tried at April term, 1821, when a verdict was rendered for the plaintiff, the parol evidence of the written contract having been given without objection. The Court granted a new trial which came on in April term, 1822, when the defendant objected to parol evidence of the written contract; and the plaintiff, to lay the ground for admitting it, made affidavit "in relation to the memorandum of agreement between himself and the defendant relative to the stock mentioned in the declaration, that his impression is that he tore up the same, after the transfer of the stock, believing that the statements, upon which the contract had been made, were correct, and that he would have no further use for the paper; he is not certain that he did tear it up, and does not recollect doing so; but such is his impression. If he did not tear it up, it has become lost or mislaid; and that he has searched for it among his papers repeatedly, and cannot find it." The plaintiff served a notice on *Mr. D. M. Forrest*, the defendant's attorney at law, to produce the defendant's counterpart of the agreement, but he disclaimed any obligation on him to produce it if it was ever in his possession.

The plaintiff then offered parol evidence of the written contract, but the COURT (MORSELL, J., *contrà*,) refused to permit it to be given; being of opinion that if the written contract was mislaid only, it was not sufficient ground to admit the secondary evidence, but might be ground for a continuance of the cause to give the plaintiff time to make further search for the paper.

The COURT (*nem. con.*) also refused to receive the parol evidence on the ground that it had been, at the former trial, received without objection.

The jury found a verdict for the defendant. The plaintiff took a bill of exceptions, and the judgment was reversed by the Supreme Court, 9 Wheat. 483, and the cause was sent back by mandate, directing a *venire de novo*, and again came to trial the present term, (May 1826,) and the plaintiff offered the following evidence subject to the objections of the defendant to the admissibility of the evidence as it should be delivered.

1. The testimony of William Hebb, who stated that "he found

the plaintiff and defendant sitting at the directors' table, and the defendant said to him that he was glad he had returned; that the plaintiff was about to buy out his stock and requested him to take a seat and be an evidence to the contract; upon which the plaintiff asked the defendant what were his terms; and the defendant answered he would take par, with the dividend which should be declared at the next periodical term, which he said he thought would be four per cent.; that the plaintiff then said he supposed he only meant the interest accrued down to that time; to which the defendant assented. The plaintiff then took his pen and made the calculations and said it amounted to three per cent. on that day. The plaintiff said it was a heavy purchase and if the defendant would allow him a few days to consult his friends he would take it on these terms. The defendant then asked the plaintiff to draw up a memorandum, in writing, of the agreement, which he did. The plaintiff read over the writing hastily in the presence and hearing of the defendant and the witness; the defendant approved of it, and said he would get Mr. Washington to copy it, and each could have one; the defendant brought the original paper back with the copy taken by Mr. Washington; both parties signed each paper, and the witness attested the same as a subscribing witness; each took one." "The witness does not recollect the phraseology of the writing as to the payment of the money, but recollects that it bound the defendant to transfer the stock if plaintiff decided to take it in a certain number of days, which he believes was three or five, but does not recollect which. He believes the paper contained the verbal contract as the parties had made it, as the witness has before stated it. Witness continued a director till after the next dividend day, and no dividend was made." "The witness being asked on his cross-examination, whether the writing which he has mentioned was in the following terms, or terms to this effect, as read from the deposition of Lawrence Washington: 'I bind myself to receive, at any time within three days, three per cent. advance upon my stock in the Central Bank of Georgetown and Washington;' and if not, wherein these terms differ from the writing as recollected by him; said, in reply, that "the writing, as recollected by him, was the reverse of the terms above propounded, inasmuch as the writing, described by him, bound the defendant to transfer the stock."

The witness being further cross-examined, says, "he does not think the writing mentioned the quantity of stock, which had before been ascertained; that he does not recollect whether the written contract expressed that par was to be paid for it, nor that any advance upon the stock was specified in the contract:

he does not recollect how it was expressed, but his impression and belief is, that the understanding of the parties was that three per cent. was to be paid upon a contingency that the next dividend amounted to four per cent. and that the written contract was to the same effect."

The plaintiff then offered the evidence of Francis Dodge and William Thompson, who testified that "on the 20th of May, 1818, the defendant transferred to the plaintiff 7462 shares in the stock of the said Central Bank, which at par amounted to \$63,427; and that on the same day the plaintiff paid the defendant \$21,029.81, and retired the defendant's stock-notes by substituting the plaintiff's stock-notes to the amount of \$44,300. That on the 26th or 27th of the same month, Francis Dodge succeeded the defendant as president of the said bank, and from that time the defendant took no part in the direction of its affairs; that the then next stated day for making dividends, by the charter, was the first week in July, 1818, and no dividend was then declared on the capital stock of the said bank." "The defendant waived so much of his objection to the said evidence of Dodge and Thompson, as required the production of the books, and other documents, by which the facts, stated by those witnesses, are proved, relying upon the inadmissibility and incompetency of the facts so offered to be proved."

And upon the evidence, so offered as aforesaid, the plaintiff claimed to recover, in this action, the advance, so stated to have been paid by him, upon the stock; that is the difference between the par value and the sum paid, equal to \$1,902.81, with interest.

Whereupon the defendant objected to the admissibility and competency of the said evidence, in the terms so offered as aforesaid, to sustain the first count of the plaintiff's declaration.

But the COURT (CRANCH, C. J., *contra*,) decided, that the same was admissible and competent to sustain the said count, and the same was given to the jury.

The defendant then objected to the admissibility and competency of the said evidence, to sustain the second count, and prayed the opinion and decision of the Court that the said evidence was not admissible and competent to sustain the said second count; —

But the COURT (CRANCH, C. J., *contra*,) overruled the said objection and prayer, and admitted the said evidence under the second count also.

The plaintiff having given to the jury the evidence so offered by him, and having thereupon rested his case, the defendant, by the consent of the parties, read to the jury the deposition of Mr. Lawrence Washington, the person referred to in the testimony of Mr. Hebb.

Whereupon the defendant prayed the Court's opinion, and instruction to the jury, as follows:—

That the evidence so given by the plaintiff as aforesaid, either taken by itself, or in connection with that of the defendant, is not competent and sufficient to be left to the jury, as evidence that the said written contract continued to be executory after the transfer of the stock by the defendant to the plaintiff, and the payment therefor by the plaintiff, as stated in the plaintiff's said evidence; nor that it contained any stipulation or condition that the 3 per cent. advance upon the said stock was paid or agreed to be paid by the plaintiff upon a contingency that the next dividend amounted to 4 per cent., or that the defendant should refund to the plaintiff the 3 per cent. advance upon the par value of the stock, paid by the plaintiff as aforesaid, in the event of there being no dividend declared upon such stock at the then next ensuing regular period for declaring such dividend.

But the COURT (CRANCH, C. J., *contrà*,) refused to give the said instruction, as prayed; "being of opinion that so much of the said contract as relates to the advance of the 3 per cent. portion of the dividend is executory, in so far as regarded the implied *assumpsit* of the defendant to refund the said 3 per cent. advance in the event of their being no dividend on the dividend-day."

The plaintiff then prayed the opinion and instruction of the Court to the jury, that if from the whole evidence aforesaid, the jury should be of opinion that the defendant in his written contract respecting the stock, did agree to sell his stock at par, and to take the earnings which the stock had made in lieu of the dividend which he stated and represented would be declared at the next dividend-day; and if the jury should be further of opinion that the plaintiff did actually advance to the defendant the amount of the said supposed earnings of the stock, under a belief, created by the defendant, that such dividend would be made, that then the plaintiff would be entitled to recover back the money so paid under such mistaken impression, if the jury should find from the evidence, that there was no such dividend declared, and that the said stock had not, at the time of such contract, earned any such supposed interest or dividend; which instruction,

The COURT (CRANCH, C. J., *contrà*,) gave as prayed.

Bills of exception were taken, and the verdict being for the plaintiff, the defendant sued out a writ of error, and the Supreme Court of the United States reversed the judgment, and by mandate ordered a *venire de novo*. 1 Peters, 591.

Ex parte Smith.

Ex parte WILLIAM S. SMITH.

The clerks employed in the offices of the several departments of the government, are not liable to militia duty.

UPON *habeas corpus* the marshal returned the cause of caption and detention of Mr. Smith "to be for sundry militia fines imposed by the Legionary Court of the 1st regiment, 1st brigade of the militia of the District of Columbia, put into the hands of the said marshal for collection according to law."

By the 4th section of the Act of Congress of the 1st of July, 1812, [2 Stat. at Large, 769,] supplementary to the act more effectually to provide for the organization of the militia of the District of Columbia, the militia fines are to be certified by the clerks of the legionary and battalion courts of inquiry respectively, to the marshal of the district, and delivered to him within fifteen days after the sitting of the Court, and he is required forthwith to proceed to collect the same by distress and sale of the goods and chattels of the delinquent, "and where there are no goods or chattels to be found, the marshal shall commit such delinquent to jail and hold him in close confinement during the term of twenty-four hours for each and every fine by him payable, (unless the same shall be sooner paid,) in the same manner as other persons condemned to fine and imprisonment at the suit of the United States may be committed."

The return of the marshal is informal and defective, but no exception was taken to it; the principal question intended to be raised was, whether the subordinate clerks in the public offices were liable to militia duty.

By the 2d section of the Act of Congress of the 8th of May, 1792, [1 Stat. at Large, 271,] "more effectually to provide for the national defence, by establishing an uniform militia throughout the United States," the persons exempted from militia duty are, the Vice-President of the United States; the officers, judicial and executive of the Government of the United States; the members of both houses of Congress and their respective officers; all custom-house officers, with their clerks; all post-officers and stage-drivers employed in the care and conveyance of the mail, &c. &c. The militia law of the District of Columbia exempts all who are exempted by the laws of the United States.

Mr. Smith was a clerk in the treasury department, duly appointed by one of the comptrollers, and sworn in the manner required by the act of Congress.

Mr. Hellen for Mr. Smith contended, that he was an executive

Ex parte Smith.

officer of the Government of the United States, within the meaning of the 2d section of the Act of the 8th of May, 1792, and therefore exempt from militia duty.

The Constitution of the United States, art. 2, § 2, has the expression, "principal officer in each of the executive departments," thereby implying that there may be inferior officers; and by the second clause of the same section, "Congress may, by law, vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments."

The Act of July 27, 1789, § 3, [1 Stat. at Large, 28,] requires the principal officer in the department of state, and every person appointed or employed in the department, to be sworn. There is a similar clause in the Act of August 7th, 1789, [Id. 49,] establishing the war department; and in the Act of March 3, 1791, [Id. 215,] supplemental to the act establishing the treasury department, "each and every clerk and other officer," "shall, before they enter upon the duties of such appointment, take an oath or affirmation, before one of the justices of the Supreme Court, or one of the judges of a District Court of the United States, to support the Constitution of the United States, and also an oath or affirmation, well and faithfully to execute the trust committed to him, which oath or affirmation, subscribed by such clerk, and certified by the person administering the same, shall be filed in the office of the person employing such clerk." Clerk and officer are, in the acts of Congress, used as synonymous. Great inconvenience to the government, would result from taking away their clerks to do militia duty.

Mr. J. Dunlop and Mr. Jones, contra.

Exemptions are odious, and ought to be construed strictly. None are exempted but officers commissioned by the President. There can be no officer without an office, and there can be no office unless created by the Constitution or an act of Congress. Custom-house officers are expressly exempted, which was unnecessary, if they were officers of the government. *Wise v. Withers*, 3 Cranch, 331. By naming custom-house clerks, the legislature meant to exclude all other clerks.

The COURT (THRUSTON, J., absent,) decided, that Mr. Smith, being at the time of his enrolment, and at the time he was required to muster, a clerk in the treasury department, duly appointed by one of the comptrollers, and sworn in the manner required by the act of Congress, was an executive officer of the Government of the United States, and within the 2d section of the Act of May 8, 1792, and was not liable to be enrolled in the militia.

UNION BANK OF GEORGETOWN v. LEONARD MACKALL.

If the teller of a bank, according to the usage of banks, and of the plaintiffs' bank, receive as cash, the check of an individual of good credit upon another bank, in which it afterwards appeared that he had no funds, it is not necessary for his justification, that he should further show that it was done at the risk and responsibility, and by the authority of his bank, and not at his own risk; and if in taking such a check he did only what was usual in the ordinary course of the trade and business of banking, and the usage of banks in like circumstances, his so taking it was not a breach of the condition of his official bond, "to make good to the bank all damages which it should sustain, through his unfaithfulness or want of care."

If the teller of a bank, after receiving, as cash, an invalid check upon another bank, consents to take it as his own, and look to the drawer of the check for payment of it, he cannot afterwards, without the consent of his bank, return the check and throw it upon them.

If the plaintiffs' teller, according to the usage of banks, has received, as cash, a check of an individual of good credit, upon another bank, and the check is not paid, and he agrees to take the debt upon himself, yet the plaintiffs cannot recover the amount in an action upon his official bond, the only breach assigned being the receipt of the check as cash.

DEBT upon the official bond of the teller of the Union Bank of Georgetown, the condition of which was, that "he should faithfully perform all the duties assigned to him in said bank, and make good to the said bank all damages which the same shall sustain through his unfaithfulness or want of care."

The only breach assigned was, that the defendant, as teller of the bank, received C. P. Beeding's check on the Bank of Columbia, for \$405, which was not paid.

The defence was, that Beeding was, at the time, in good credit, and that it was the usage of the banks in this district, and of the plaintiffs' own bank, to receive, as cash, the checks of individuals of good credit, upon other banks.

Evidence was offered by the defendant, of such usage. And the plaintiff offered evidence that the defendant had obtained an attachment in Montgomery county, in Maryland, in his own name, against Beeding, the drawer of the check; in order to obtain which, he made oath that Beeding was indebted to him in the amount of the check. But it appeared, also, that he first applied to the clerk of that county for an attachment, in the name of the bank, but was told by the clerk he could not get one, as teller, but he might obtain one in his own name; whereupon, he did so. Evidence was also offered by the plaintiffs, that the defendant, as teller, had received, as cash, the check of C. P. Beeding, upon the Bank of Columbia, for \$405, which was not paid, the drawer having no funds there to meet it.

Whereupon, *Mr. Key*, for the plaintiffs, prayed the Court to instruct the jury "that the general usage of the tellers of banks, and of the Union Bank, given in evidence by the defendant, to

Bank of the United States v. Brent.

take as cash, checks of individuals, does not, of itself, though believed by the jury, bar the plaintiffs' right to recover; but the defendant must further show that the taking of such checks, as cash, (which turned out to be bad,) by the tellers, was an act done at the risk and responsibility, and by the authority of the bank, and not at the risk of the teller."

Which instruction the COURT (THRUSTON, J., *contrà*,) refused to give, but instructed them that if they should be of opinion, from the evidence, that the defendant, as teller of the said bank, in receiving, as cash, the said check of the said Beeding, in manner aforesaid, did only what was usual in the ordinary course of trade and business of banking, and the usage of said banks, in like circumstances, it is not a breach of the condition of his said bond. See *Russel et al. v. Hankey et al.* 6 T. R. 12.

Mr. Key, for the plaintiffs, then prayed the Court to instruct the jury, that if they believed, from the evidence, that the defendant, after taking the check in question, consented to take it upon himself, as his own, and look to Beeding for the payment of it, then the defendant could not, afterwards, without the consent of the bank, return the said check and throw it upon the plaintiffs.

Which instruction the Court gave; but, at the prayer of the defendant's counsel, (*Mr. Jones*,) further instructed them, that, if they should find, from the evidence, that the defendant brought the said suit in Montgomery county, upon which the plaintiffs rely, as evidence of the consent above imputed to the defendant, with the concurrence of the president of the bank, as agent, and for the advantage of the bank, and with an express understanding that it should not affect his liability as teller, for the receipt of the said check; and that, at the time when the said check was received, and when the said suit was brought, the said defendant was not bound to make good the said check to the plaintiffs, but had taken the same under the usage aforesaid, as sanctioned by the bank, then the circumstance of his so having treated the check as his own, does not entitle the plaintiffs to recover in this action.

The verdict and judgment were for the defendant. The plaintiffs took a bill of exceptions, but no writ of error was prosecuted.

Mr. Key, for the plaintiffs.

Mr. Sampson and *Mr. Jones*, for the defendant.

BANK OF THE UNITED STATES v. WILLIAM BRENT, Surety of
Richmond Johnson.

In an official bond, the words "well and faithfully execute the office, and in all things relating to the same, well and faithfully behave," mean the same as the words "faithfully perform the trust reposed in them."

Bank of the United States v. Brent.

Quære, whether the official bond of the teller of a branch bank of the United States, is void because not taken conformably with the 6th article of the Rules and Regulations for the government of the Offices of Discount and Deposit of the Bank of the United States?

It was not void because executed fourteen days after the teller had entered upon the duties of his office.

DEBT upon the official bond of Richmond Johnson, a teller of the Office of Discount and Deposit of the Bank of the United States, at Washington, dated 21st September, 1819, in the penalty of \$20,000, the condition of which was, that he should "well and faithfully execute the said office, and in all things relating to the same, should well and faithfully behave."

By the 14th article of the constitution of the bank, which is contained in the 11th section of the act of incorporation, the directors are authorized to establish offices of Discount and Deposit in the several States and Territories, "and to commit the management of the said offices and the business thereof, respectively, to such persons and under such regulations as they shall think proper."

Under that power the directors established "rules and regulations for the government of the Offices of Discount and Deposit of the Bank of the United States," consisting of thirty-one articles, the sixth of which is in these words.

"The tellers, clerks, and servants of the offices shall be appointed by their directors, and before they enter on the duties of their respective offices, bonds shall be given, with sufficient surety, (to be approved by the directors,) for the faithful performance of the trust reposed in them."

The breach of the condition of the bond, alleged in the declaration was, "that the said R. J. did not well and faithfully execute the said office, and in all things relating to the same, well and faithfully behave," but at divers times, by virtue of his appointment of teller, received divers sums of money, amounting to \$7,000, &c., "and hath not rendered nor paid to the plaintiffs the said sum of money, nor any part thereof, nor any just, true, or fair account thereof, or of any part thereof," but refused so to do, "contrary to the faithful execution of the said office, and to faithful behavior in relation to the same, and contrary to the form and effect of the said condition."

The defendant pleaded six special pleas; the pleadings upon which resulted in general demurrers, except the third and fifth pleas, upon which issues were joined.

The demurrer to the first plea raised the question whether the bond was void because executed fourteen days after the teller had entered upon the duties of his office.

The demurrer to the second plea raised the question whether

an official bond, with a condition that the officer "shall well and faithfully execute his office, and in all things relating to the same, well and faithfully behave," be a valid bond, if required and taken under a color, and by pretence of a rule, regulation, or by-law which requires that bonds shall be given by the officers "for the faithful performance of the trust reposed in them."

The demurrer to the fourth plea raised the question whether, under the condition of a bond "well and faithfully to execute the office, and in all things relating to the same, well and faithfully to behave," the defendant (a surety,) is liable for mistakes made by the officer, in his office, not through want of fidelity or honesty on the part of the officer.

The demurrer to the rejoinder to the sixth plea raised the question whether the defendant, under the condition of this bond, (which was required and taken by the plaintiffs, in fulfilment and supposed pursuance of the sixth article of the rules and regulations for the government of the Offices of Discount and Deposit of the Bank of the United States,) was liable for the casual, involuntary, and honest mistakes of the officer, in keeping his accounts, although the condition of the bond be that he shall well and faithfully execute the office.

These questions may be reduced to two, namely:

1. Do the words "well and faithfully execute the office, and in all things relating to the same, well and faithfully behave," mean the same as the words "faithfully perform the trust reposed in them?"

2. If they do not, then, whether the bond is void because not conformable to the sixth rule.

Mr. Jones and *Mr. Wallach*, for the defendant, to show that the bond, if not taken agreeably to the by-law, is void, cited the case of *The Bank of the United States v. Dandridge & Stephenson*, decided by Marshall, C. J., in Richmond.

They contended, also, that "well and faithfully," in the condition of this bond, refer only to his fidelity, not to his skill in executing the duties of his office. Such is evidently the intent of the by-law, and the condition ought to be construed in reference to the by-law. *The Union Bank v. Clossy*, 10 Johns. 271; *Miller v. Stewart*, 9 Wheat. 702, *Mr. Justice Story's* opinion.

Mr. Lear and *Mr. Swann*, *contrâ*.

The directors had a right to take such a bond, and therefore, whether it conforms to the rule or not, it is a valid bond. The case in *Johnson* was decided upon the particular words of the condition, and not upon any general principle. "Well" refers to skill, "faithfully" to honesty. The two words cover mistakes and fraud.

Kurtz v. Beatty and Ritchie.

Mr. Jones, in reply. The rule is equivalent to a statute, and, within its sphere of action, is as effectual; and the law is clear, that a bond taken under a statute must conform to it. See *Barton v. Webb*, 8 T. R. 459; *Shum v. Farrington*, 1 B. & P. 460; 2 Chitty, Pl. 633; *Harris v. Mantle*, 3 T. R. 307; *Foster v. Pierson*, 4 Id. 617.

Mr. Lear cited *Rhodes v. Vaughan*, 2 Hawke's N. Caro. Rep. 167; *Hugh v. Smith*, 5 Johns. 168; *Clapp v. Coffin*, 7 Mass. Rep. 98; *Freeman v. Davis*, Id. 200; *Moss v. Hodsdon*, 5 Mass. Rep. 314; *Stevens v. Boice*, 9 Johns. 292.

November 28, 1826. The COURT (THRUSTON, J., *contra*,) rendered judgment, upon the demurrers, for the defendant; being of opinion that the words, (in the condition of the bond) "well and faithfully execute the office, and in all things, relating to the same, well and faithfully behave;" substantially mean the same as the words in the sixth article of the rules and regulations, "faithfully perform the trust reposed in them," and the defendant was bound only for the teller's fidelity, not his skill. *Union Bank v. Clossy*, 10 Johns. 271. The Court gave no opinion upon the question whether a bond taken under color of the sixth article of the rules and regulations, &c., be void if it do not substantially pursue the requisition of the article.

But upon this point see the cases cited in the argument, and, *Nottingham v. Giles*, 1 Pennington's N. J. Rep. 120; *United States v. Speake*, 9 Cranch, 28; *United States v. Sawyer*, 1 Gallison, 96; *Brig Struggle*, Id. 476; *United States v. Morgan*, MS. in the Circuit Court of the United States for the District of Pennsylvania, in 1811; *Armstrong v. United States*, in the Circuit Court of United States for District of N. J. in 1811; *Peters, C. C. Rep.* 46; *United States v. Hipkins et al.* in the District Court at Norfolk, in December, 1808; 2 Hall's Law Journal, 80; *United States v. Smith*, in the District Court for N. Y. in 1809; 2 Hall's Law Journal, 456.

KURTZ *et al.*, Trustees of the German Lutheran Church, *v.*
CHARLES A. BEATTY AND J. T. RITCHIE.

Although a dedication of a lot to pious uses may be too vague an appointment to be carried into effect in a court of equity upon general principles: yet, if it has been long occupied for those uses, with the knowledge and consent of the donor, his heirs may be perpetually enjoined from disturbing the possession.

THE plaintiffs, describing themselves as "trustees and agents of the German Lutheran Church," filed their bill in equity against Charles A. Beatty, heir at law of Charles Beatty, deceased, and

Kurtz v. Beatty and Ritchie.

John T. Ritchie, who claimed title to a lot in Beatty and Hawkins's addition to Georgetown, which they aver Charles Beatty, the proprietor of the land, had in the year 1769, at the time of laying it out into lots "distinguished and set apart," "for the sole use and benefit of the German Lutheran Church, and caused the same to be so entered and designated in the plat of the said addition." That soon afterwards the said lot was taken possession of by the German Lutherans, inclosed, and a school-house erected thereon, and has been kept and held by them ever since, during a period of upwards of fifty years; and has been used by them as a burying-ground for the members of the Church. That during all that time, neither their possession nor title had been questioned. That Charles Beatty died sixteen years ago without having made a conveyance of the lot, and that Charles A. Beatty, the defendant, is his heir at law. They therefore pray that he may be compelled to make a conveyance of the same to the plaintiffs, in trust for the German Lutheran Church.

These facts were either admitted by the answers of the defendants, or proved by testimony in the cause.

CRANCH, C. J., delivered the opinion of the Court, as follows, (THRUSTON, J. absent, but concurring,)

The COURT, in this case, is of opinion that the designation of the lot on the plat "for the Lutheran Church," is too vague an appointment to be carried into effect, in a court of equity, upon general principles; and that it is not aided by the statute of 43 Eliz. c. 4, which has been decided by the Court of Appeals in Maryland, in June term, 1822, not to be in force in that State. *Dashield v. The Attorney-General*, 5 Harris & Johnson, 392. See also the case of the *Baptist Association v. Hart's Executors*, 4 Wheat. Appendix, note l. p. 3.

The Court, therefore, cannot decree a conveyance of that lot to the trustees of the German Lutheran Church. But as they have been in possession of the lot for many years, (probably nearly fifty years,) and have used it as a church lot and burying-ground; and as the donor, Charles Beatty, and his son and heir at law, Charles A. Beatty, have declared that the lot belongs to the Lutheran Church, and that they were always ready to convey the same for the use of that church, the Court thinks that the defendant cannot now conscientiously turn the complainants out of possession, and will therefore decree a perpetual injunction.

Affirmed by the Supreme Court, 2 Peters, 566.

JOHN KURTZ v. VALENTINE BOGENRIFF, MARGARET BOGENRIFF,
W. GOOD, DANIEL KURTZ, AND THE BANK OF COLUMBIA.

Notice to the agent, is notice to the principal.

He who takes a legal title, with notice of a prior equitable title, is trustee for him who holds the equitable title; but the legal title, obtained by a purchaser under the former, although with notice of the prior equitable title, will not be disturbed, if the purchaser was encouraged by the latter to pay the purchase-money.

BILL IN CHANCERY, praying for a decree under the Act of Maryland, to record a deed of trust from Margaret Bogenriff to John Mountz, to secure a debt of \$500 due by her son Valentine Bogenriff to the plaintiff; and to charge the Bank of Columbia, who took a subsequent deed of trust from the same Margaret Bogenriff to secure a debt due by her said son to the bank. It states that the defendant Daniel Kurtz was the agent of the bank in taking the deed, and had notice of the unrecorded prior deed to Mountz, and of the accident by which it was prevented from being recorded. That Daniel Kurtz, by order of the bank, sold and conveyed the property to the defendant W. Good for \$1,800. That the plaintiff gave notice to Good, before he paid the purchase-money, of the prior unrecorded deed.

Mr. Marbury, for the plaintiff, contended that notice to Daniel Kurtz, the agent of the bank, was notice to the bank; and the bank, having got the legal title with notice of the prior deed to Mountz in trust to secure the debt to the plaintiff, and having sold the property and received the purchase-money, was a trustee for the plaintiff to the extent of the debt due to him by Valentine Bogenriff; and cited the following authorities. *Le Neve v. Le Neve*, Ambler, 436; *Brotherton v. Hatt*, 2 Vern. 574; *Jennings v. Moore*, Id. 609; *Attorney-General v. Gower*, 2 Eq. Ca. Ab. 685; *Norris v. Leneve*, 3 Atk. 26; *Maddison v. Andrew*, 1 Vez. 62; *Pomfret v. Windsor*, 2 Vez. 485; *Williams v. Lee*, 3 Atk. 224; *Worsley v. Scarborough*, Id. 392; *Lowther v. Carlton*, 2 Atk. 242; 2 Eq. Ca. Ab. 282; *Toulmin v. Steere*, 3 Meriv. Rep. 210.

Mr. Key, contra. The principle upon which the rule of equity is founded, is fraud. Sugden, 471. There must be apparent fraud, or undoubted proof of notice. Kurtz was not such an agent of the bank as that his knowledge should bind the bank. He was to do a mere ministerial act in which he had no discretion. He was only to receive the deed. If he had power to negotiate for it, his knowledge would have bound the bank. The fact that he was the trustee in the deed makes no difference. Notice to a mere trustee without interest cannot bind the principal. The

Kurtz v. Bank of Columbia.

ground of decision in the case of *Le Neve v. Le Neve*, was, that the wife placed confidence in Norton, who was her solicitor to arrange the business of her settlement. The notice must be given to some person authorized to treat. Previous knowledge, before the agency, is not sufficient. The notice must be in the transaction itself in which he is employed.

Mr. Key cited *Merrill v. Sloan*, 1 Murphy, 121; 3 American Dig. 19; Hammond's Dig. 560; *Shelburn v. Inchiquin*, 1 Bro. C. C. 338; Sugden, 493; *Hilcock v. Humphreys*, Barnardiston, 220.

December 13, 1826. CRANCH, C. J., delivered the opinion of the Court, (THRUSTON, J., absent.)

The facts of this case are these :

The plaintiff lent the defendant Valentine Bogenriff \$500, on the faith of the deed of trust executed by his mother to John Mountz. The defendant, Daniel Kurtz, was afterwards the agent and trustee of the Bank of Columbia, to treat with Mrs. Bogenriff for a deed of the same property to him in trust to secure a debt due by the defendant Valentine Bogenriff to that bank. He did, accordingly, as agent of the bank, treat with Mrs. B. for, and did take from her such a deed, with full knowledge, and with express notice at the time, given to him by Mrs. B., that she had made the prior deed of trust to secure the money lent by the plaintiff to the defendant Valentine, and that that debt was not paid.

The principle in equity has long been established that notice to the agent is notice to the principal.

The Bank of Columbia, therefore, must be considered as having taken the security subject to the prior incumbrance of the plaintiff; and, having sold the property, and received money to a greater amount than the plaintiff's claim, must be deemed to be trustee for the plaintiff to the extent of the debt and interest due to him.

The answer of W. Good does not admit that he had notice of the plaintiff's claim, before he paid the purchase-money; but if it did, it states also that the plaintiff informed him that all would be right, and that the bank would satisfy his claim. Upon such information he was justified in paying the purchase-money and getting a deed for the lot, notwithstanding the notice; which it is probable was the fact. His title, therefore, must not be disturbed by the plaintiff.

But the Court will decree that the Bank of Columbia pay to the plaintiff the debt due to him by Valentine Bogenriff and secured by the deed of trust from Margaret Bogenriff to John Mountz, with interest and the costs of this suit.

Peltz's Heirs v. Clarke.

The Court will not order that deed to be recorded; because it is unnecessary as it regards the Bank of Columbia, and because it might injure the title of W. Good, which, under the circumstances stated in his answer, (which, with the other answers, was agreed to be read in evidence as if it were a deposition regularly taken in the cause,) ought not to be disturbed by the plaintiff.

W. S. NICHOLLS v. SAMUEL AND JOSEPH FEARSON.

If a promissory note, indorsed by the defendants, without an understanding that they were not to be responsible upon their indorsement, be discounted by the plaintiff at a rate exceeding the lawful rate of interest for the time the note had to run, the transaction is usurious.

ASSUMPSIT, against the indorsers of W. Stewart's note for \$101, at sixty days.

The evidence was that the defendants, having received this note in a fair transaction, took it to the plaintiff's shop, with their own indorsement on it, and asked him what he would give them for it; the plaintiff replied \$97, to which the defendants agreed, and received the money.

Mr. Cox, for the defendant, prayed the Court to instruct the jury; and the COURT (MORSELL, J., *contrà*,) did instruct them, that if they believed, from the said evidence that the plaintiff received the said note from the defendants with their indorsement thereon, and without an understanding that they were not to be responsible upon their said indorsement, and that the plaintiff paid therefor only the sum of \$97, the transaction was usurious, and the plaintiff was not entitled to recover.

MORSELL, J., thought the whole subject ought to have been left to the jury without instruction from the Court.

Mr. Key, for the plaintiff, then prayed two instructions which the COURT (MORSELL, J., not sitting,) refused to give, because the evidence did not warrant the statement of facts upon which the the prayers were founded.

Reversed by the Superior Court, February, 1833, 7 Peters, 103.

PELTZ'S HEIRS v. CLARKE.

A copy of a deed of lands from the record-book may be read in evidence without producing the original, or accounting for its non-production.

The superintendent of the city of Washington was authorized by law, to take the acknowledgment of deeds of lands within the city.

The entries of the division and allotment of the property of the original proprietors of

Bank of Columbia v. Sweeny.

the lands in the city of Washington, may be given in evidence without producing, or accounting for, the non-production of the original certificate of division and allotment from which the entries were made.

EJECTMENT, for an undivided moiety of lot No. 3, in square No. 461, in the city of Washington.

Upon the trial the plaintiff produced and offered to read in evidence from the book of land records for this county, a copy of a deed with a copy of the acknowledgment thereof, purporting to have been acknowledged before and certified by Thomas Monroe, superintendent, &c., and offered no evidence to account for the non-production of the supposed original nor any proof of the execution of such original other than the said land record book purporting to set out the copy of said deed or of the said certificate of said Thomas Monroe; to the reading of which copy the defendant objected, but the COURT (THRUSTON, J., absent,) overruled the objection and admitted the same in evidence.

Mr. Jones, for the defendant, also contended that *Mr. Monroe*, the superintendent of the city, had no authority to take the acknowledgment of the deed; the Act of Congress under which he was appointed having transferred to him only those powers of the former commissioners, which were to be executed by them as commissioners, that is, as a board of commissioners, not the powers which any individual commissioner could exercise; but the Court overruled the objection.

The COURT also permitted the plaintiff to read in evidence the record book of the entries of the division and allotment of the square No. 461, without producing or accounting for the non-production of the original certificate of division and allotment from which those entries were made.

The Court also gave an instruction, to which the plaintiffs excepted, and the verdict being against them, they took a writ of error to the Supreme Court, where the judgment of this Court was affirmed. See the case in 5 Peters, 481.

BANK OF COLUMBIA v. GEORGE SWEENEY.

Upon the return of an execution issued by the President of the Bank of Columbia, without a judgment, under the 14th section of its charter of 1793, if the defendant disputes the debt, the Court will order an issue to be made up, and will permit the defendant to plead the statute of limitations.

UPON the return of a *ca. sa.* issued by order of the President of the Bank of Columbia, under the 14th section of its charter of 1793, c. 30, without a previous judgment, the defendant hav-

ing disputed the debt, the Court ordered an issue to be made up between the parties, and for that purpose required the plaintiffs to file their declaration within days, and the defendant to plead thereto within three days after notice of filing the declaration. Whereupon the plaintiffs filed their declaration in *assumpsit* as upon a wager that the debt claimed was due; to which the defendant pleaded the general issue, and offered to plead the statute of limitations, namely, that the defendant did not assume at any time "within three years next before the commencement of this suit;" and that the plaintiffs' cause of action "did not accrue at any time within three years next before the commencement of this suit."

To the filing of the plea of limitations the plaintiffs objected.

By the 14th section of the charter of 1793, c. 30, "if the defendant shall dispute the debt, or any part of it," the court is required to "order an issue to be joined and trial had," at the return term of the execution.

Mr. Key and *Mr. Jones*, for the plaintiffs, contended that the charter only allowed the defendant, at the return of the execution, to dispute the debt. The plea of limitations does not dispute the debt; it only goes to bar the remedy by certain forms of action. *Pearson v. Dwight*, 2 Mass. Rep. 84; Esp. N. P. 563, 1 Cranch, 343, Appendix, 465. And this is not one of the forms of action to which the statute applies. Indeed, this is not an action; but if it is, it is not one of those enumerated in the statute. The debt remains for every purpose except that of supporting any of the forms of action barred by the statute. This is a new remedy given by the charter, and is obligatory upon those only who have voluntarily subjected themselves to it, by making their notes "negotiable in the Bank of Columbia." If this is to be considered as an action, the plaintiffs' right of action did not accrue until the president of the bank had made a personal demand upon the defendant, according to the forms prescribed in the charter. The charter only allows the defendant to plead to the debt, not to the action. The order of the president of the bank to the clerk of the court to issue the execution is equivalent to a judgment; and the charter declares that it shall be as valid as any execution issued upon a judgment of a court. The statute of limitations applies only to such forms of action as were then in existence; but this is a new remedy, and not within the prohibition of the statute.

Mr. Swann and *Mr. Ashton*, *contra*. The charter only meant to give a speedy trial at the first term, and to enable the plaintiffs to obtain security in the first instance, without waiting the slow process of the common law. It did not mean to deprive the

defendant of any defence which he might have if sued in any other form. The statute is a bar to the debt. *Hollings v. Shaw*, 2 Taunt. 237.

CRANCH, C. J., after stating the case, and the provisions of the 14th section of the charter, delivered the opinion of the Court, as follows, (*nem. con.*)

The expressions in the 14th section of the charter seem to imply that there should be a declaration in some of the usual forms of action. The plaintiffs, in the present case, have selected the action of *assumpsit*. So far as regards the trial, it is not important by what sort of process the defendant is brought into court. There is nothing in the Act of 1793, c. 30, (the charter of the bank,) which expressly deprives him of any ground of defence which he would have had, if he had been brought in by the ordinary process of *capias ad respondendum*, instead of that of *capias ad satisfaciendum*. When brought in he has a right to dispute the debt, and to have a full and fair trial. The object of the summary remedy is to prevent delay, and to enable the bank to obtain security; not to deprive the defendant of the means of defence enjoyed by other debtors. So far as it is summary it is in derogation of common right, and must be construed strictly.

It is true that by the 14th section of the charter, the execution is to be "as valid and effectual in law, to all intents and purposes as if it had issued on a judgment regularly obtained in the ordinary course of proceeding;" and so it is while it exists. But if, upon the trial, it should be found that the plaintiffs ought not to have the execution, the Court has the power to quash it.

The validity of the execution cannot affect the trial.

But it is said that if this execution be the commencement of an action (as seemed to be admitted by Mr. Key, in arguing the case of *The Bank of Columbia v. Bunnell*, in this Court at April term, 1822, [*ante*, 306,] and the case of *The Bank of Columbia v. Oakley*, in the Supreme Court, and as suggested by Mr. Justice Johnson, in delivering the opinion of the Court in the latter case. 4 Wheat. 239¹;) it is not within the description of actions limited by the statute of limitations; which statute affects the remedy only; not the right.

To this it may be answered, that no man ought to be deprived of a plain, common right, by doubtful implication or remote inference. The statute of limitations is a general statute. Every man has a right to claim the benefit of it; and some of the wisest

¹ See also 2 Williams's Saunders, 6, note 1. "Whenever the defendant may plead to any writ, whether original or judicial, (as this is) it is in law an action."

Wilson's Administrator v. Berry.

judges have said it was a beneficial statute. The prohibition to use it in the present case is doubtful. It is supported only by doubtful inference.

The issue to be tried is left to the discretion of the judges, who are required to see "that justice be done in the speediest manner." It cannot be just that a man should be deprived of a lawful defence, unless by his own neglect to avail himself of it in proper time. This is the first time the defendant has had an opportunity to plead the statute; and we cannot say that a defence which has been authorized by law, and in common use for more than a century and a half, is an unjust defence.

If the plaintiffs had commenced their action by the usual process, which they had a right to do, this defence would have been clearly open to the defendant, and it is not probable that the legislature intended to leave it to the option of the plaintiffs, whether the defendant should, or should not be permitted to avail himself of the statute of limitations.

We think, therefore, that the defendant has a right to plead the statute, and ought to be permitted now to file the plea.¹

Verdict and judgment for the defendant.

WILSON'S ADMINISTRATOR v. B. M. BERRY.

A variance between the *capias ad respondendum* and the declaration, is not a ground for arresting the judgment.

THE *capias ad respondendum* was issued in trespass on the case. The declaration was in covenant upon a sealed instrument covenanting to pay certain debts amounting to \$846.47, with interest. The defendant appeared and pleaded "covenants performed," &c., upon which there was an issue and a verdict for the plaintiff.

Mr. Frost, for the defendant, on the 20th of June, 1826, moved in arrest of judgment, on account of the variance between the writ and the declaration, and cited 3 Bl. Com. 393; 1 Chitty, 438, 443.

¹ This judgment was, in effect, affirmed by the Supreme Court of the United States, in January term, 1828, by the refusal of the *mandamus*. 1 Peters, 567, and directly affirmed in 1829; 2 Peters, 671.

On the subject of pleading the statute of limitations, see *Pearsall v. Dwight*, 2 Mass. Rep. 84; *Hallings v. Shaw*, 2 Taunt. 237; *Nash v. Tipper*, 1 N. Y. T. R. 402; *Berri's case*, 4 Co. 8; *Ewer v. Jones*, 2 Ld. Raym. 934; *Lord Hollis's case*, 2 Vent. 345; *Hyde qui tam v. Partridge*, 2 Ld. Raym. 1204; *Strithorst v. Graeme*, 3 Wils. 145; S. C. 2 W. Bl. 723; *Trueman v. Fenton*, Cowp. 548; *Quantock v. England*, 5 Barr. 2630. *Willet v. Atterton*, 1 W. Bl. 35; *Cox v. Roll*, 2 Wils. 253; *Green v. Rivett*, 2 Salk. 421; S. C. 7 Mod. 12; *Foliot v. Ogden*, 1 H. Bl. 35; *Duplein v. DeRouen*, 2 Vern. 540; *Huber. tit. De Conflictu Legum*, Vol. 2, lib. 1.

Mr. Swann, for the plaintiff, contended that judgment cannot be arrested for error in process.

The COURT adjourned on the 21st of June, to the last Monday of November, when

CRANCH, C. J., delivered the following opinion (the other judges concurring) :—

This is a motion in arrest of judgment for variance between the writ of *capias ad respondendum* and the declaration; the writ being in trespass on the case, and the declaration being in covenant.

“Arrests of judgment arise from intrinsic causes appearing on the face of the record; of this kind are, 1. Where the declaration varies totally from the original writ; as where the writ is in debt, and the plaintiff declares in an action upon the case for an *assumpsit*; for the original writ out of chancery being the foundation and warrant of the whole proceedings in the common pleas, if the declaration does not pursue the nature of the writ, the court's authority totally fails.” 3 Bl. Com. 393.

In England, pleas in abatement to the count could only be pleaded in actions by original writ. After declaration, formerly, the defendant might demand *oyer* of the writ, and then, the same being set forth on the roll, if there were any variance between the count and the writ, and a record or specialty, &c., mentioned in the count, the defendant might plead such variance in abatement, or demur; move in arrest of judgment, or sustain error. 1 Chitty's Pleadings, 438; *Hole v. Finch*, 2 Wils. 394; Com. Dig. Abatement, G. 8; 3 Instr. Cl. 62; Reg. Pl. 277, 278. But, as the variance between the writ and count could in no case be pleaded without craving *oyer* of the writ, (*Hole v. Finch*, 2 Wils. 394, 395,) and the defendant cannot now have such *oyer*, such variance or defect is no longer pleadable in abatement, and if it be pleaded in abatement, the plaintiff may sign judgment, or move the court to set the plea aside. 1 Chitty, 438; *Murray v. Hubbard*, 1 B. & P. 646, 647; *Gray et al. v. Sidneff*, 3 B. & P. 395; *Deshons v. Head*, 7 East, 383; *Boats v. Edwards*, Doug. 227; *Spalding v. Mure*, 6 T. R. 364. Nor will the court set aside the proceeding, in respect of the variance, as *oyer* of the writ cannot now be craved. *Hole v. Finch*, 2 Wils. 393; *Oakley qui tam v. Giles*, 3 East, 167; 1 Chitty, 247, 249; *Boats v. Edwards*, Doug. 227.

It is one of the general requisites of a declaration, that it corresponds with the process, (Com. Dig. Pleader, C. 13,) and, in bailable actions, with the *ac etiam* and affidavit to hold the bail. 1 Chitty, 248.

Regularly the declaration should correspond with the process;

but as, according to the present practice of the courts, *oyer* of the writ cannot be craved, and a variance between the writ and declaration cannot, in any case, be pleaded in abatement, (1 Saund. 318, n. 3; *Gray v. Sidneff*, 3 B. & P. 395; *Spalding v. Mure*, 6 T. R. 364,) and as there are several instances in which the Court will not set aside the proceedings on account of a variance between the writ and declaration, many of the older decisions are no longer applicable in practice. In the King's Bench, when the proceedings are by special original, the venue must be laid in the county, into which the original was issued, or, in bailable cases, the bail will be discharged; but in the common pleas the bail would not be discharged by such variance. *Smithson v. White*, Welles, 461; *Smithson v. Smith*, Barnes, 94; *Stroud v. Lady Gerard*, Salk. 8; *Doo v. Butcher*, 3 T. R. 611; *Hole v. Finch*, 2 Wils. 393; Bac. Ab. tit. Pleas, I. 11; Tidd, 582, n. i.; *Benson v. Derby*, 1 Ld. Raym. 240, cont.

Chitty (vol. i. p. 254,) says, "Upon common process by bill in the King's Bench, or upon a *capias*, or original *quare clausum fregit* in the common pleas, the plaintiff may declare in any cause of action whatever, although the writ in each case is in trespass. *Foster v. Bonner*, Cowp. 455. But in bailable actions, the declaration must correspond with the cause and the form of action in the affidavit, and the *ac etiam* part of the *latitat* or other process, for otherwise the defendant will be discharged out of custody upon filing common bail; but this will be the only consequence, for the court will not, in such a case, set aside the proceedings for irregularity." And even, "When the proceeding has been by special original, if there be a variance between it and the declaration, the defendant will be discharged on entering a common appearance; but the proceedings will not be set aside merely on account of a variance in the cause of action; and therefore the only consequence of the mistake is, that the plaintiff loses the security of the bail."

In *Hole v. Finch*, and *Jackson v. Doleman*, 2 Wils. 395, the court said, "One reason why the court should not interpose is, that after the defendant hath appeared, and is in court, there is an end of the *mesne process*; and if the defendant craves *oyer*, it must be of the original writ; he cannot have it of the *mesne process*; and if application was to be made to the master of the rolls, he certainly would not refuse to order right originals to be made out in both these cases."

In the case of *Murray v. Hubbard*, 1 B. & P. 647, Eyre, C. J., said: "The arrest, however, is not the operation of the writ, but of the *mesne process*, which is out of the question, after appearance."

Wilson's Administrator v. Berry.

"The objection to the *mesne process* being cured by appearance in the true name, the writ, whenever it is properly called for, will be found to be a writ against the party by his true name." "The case, therefore, comes to this, that so long as it is the practice of the court to issue the *mesne process* first, and to allow an original to be sued out afterwards, if necessary to substantiate the proceedings, no advantage can be taken, after appearance, of a misnomer in *mesne process*."

In *Gray et al. v. Sidneff*, (3 B. & P. 348,) Lord Alvanley, C. J., in delivering the opinion of the court, said, "It has been long the practice not to grant *oyer* of original writs; and though, perhaps, such refusal may be considered in the first instance to have been a strong measure; yet it was the necessary consequence of assuming jurisdiction without original." "When courts adopt a fiction, they must necessarily support it. The Court of King's Bench would not allow a party to say that he was not in the custody of the marshal; nor the Court of Exchequer, that he was not the king's debtor. By this doctrine, no right is taken away from the subject, nor is he proceeded against in any way injurious to himself. If such a plea were to be allowed, the master of the rolls would issue a new writ agreeable to the declaration. If the court thinks itself at liberty to proceed without an original, it will never permit a mode of proceeding to be adopted which will have the effect of compelling the plaintiff to sue out that original which the court feels itself justified in acting without." (See also *Deshons v. Head*, 7 East, 383; 1 Saund. 318, n. 3.)

In England, neither the original writ, nor the *mesne process* is entered on the roll, so as to form any part of the record either in the King's Bench or common pleas.

A record in the King's Bench commences in this form: "London, ss. Memorandum that on Monday next, after three weeks of St. Michael, in that term, before our lord the king at Westminster, came R. B. by D. S. his attorney, and brought here into the court of our said lord the king, then and there, his certain bill against C. D. in the custody of the marshal, &c. of a plea of trespass on the case; and there are pledges of prosecution, to wit, John Doe and Richard Roe; which said bill follows in these words, to wit: London, ss. R. B. complains of C. D. in the custody of the marshal of the marshalsea of our lord the king, before the king himself being, for this, to wit," &c. See 1 *Modus Intrandi*, 1; *Barker v. Thorald*, 1 Saund. 40.

A record in the court of common pleas commences in this form: "Essex, ss. Elizabeth Savil, late of, &c. in the county aforesaid, administratrix, &c. was summoned to answer to Thomas Wallford of a plea that she render to him £300, which she detains from

him; whereupon the said Thomas, by John Reynolds, his attorney, says," &c.

A record in the King's Bench, when sent up by writ of error, is headed thus: "Pleas before our Lord the King at Westminster, of the term of the Holy Trinity, in the second year of the reign of our Lord James the Second, now king of England," &c. Rot. 139. *Gray v. Briggs*, 1 Lutwyche, 889.

A record from the common pleas is headed thus: "Pleas at Westminster, before George Treby, Knight, and his associate justices of our Lord the King of the Bench, ss. In the term of St. Hilary in the tenth and eleventh years of the reign of our Lord William the Third," &c. Rot. 1337.

It appears by the case of *Longville v. Hundred of Thistlewood*, 6 Mod. 27, that judgment cannot be arrested for variance between the original writ and declaration, unless the writ be made part of the record by oyer.

There is no case in the books where judgment has been arrested for variance between the declaration and the process.

In the case of *Bragg v. Digby*, 2 Salk. 658, "The defendant without praying oyer of the original writ, pleaded variance between the writ and count, showing particularly wherein; and the plaintiff demurred; and it was adjudged that the defendant should answer over; for he ought to have demanded oyer of the writ before he could take advantage of the variance; because, although the writ is in court, yet not being upon the same roll with the count, the defendant cannot plead to it without demanding oyer."

And in *Ellery v. Hicks and Wife*, 4 Mod. 246, upon a motion in arrest of judgment on the ground of a variance between the original writ and declaration, "the exception was disallowed, because the defendant cannot take advantage of an ill original, without demanding oyer of it; which had not been done." See also *Stephens v. White*, 2 Wash. 212; Mr Justice Lyon's opinion.

In *Lindo v. Gardner*, 1 Cranch, 344, there is a note of the reporter, intimating that in Maryland the *capias ad respondendum* is considered as part of the record; but this is the mere *dictum* of the reporter, unsupported by any authority.

In the case of *Lowry v. Lawrence*, 1 N. Y. T. R. 71, the court said, "that the declaration must be captioned (entitled) of the term when the writ is returned served;" and the court must (from the recital at the head of the declaration, that "heretofore, to wit, on the third Tuesday of July, in July term, 1801, came William Lowry and brought into the said court then and there his certain bill," &c.) "necessarily intend the fact that the writ was returned in July term, 1801, and of course the action, both in fact and technically speaking, commenced previously to that time."

This reasoning shows that the writ itself was not considered as part of the record ; because, if the writ itself had been officially before the court, the judges would not have resorted to inference for proof of the time of its issuing or of its return, but would have looked at the writ itself.

Finch, in his "Common Law," (fol. 54 *b.* French edition, p. 172 of the English edition of 1759, Lib. 3, c. 1,) says, "such is the commencement of the suit," (that is, the original writ.) "The proceeding until judgment consists of two parts, the parol and the process, and this is proved by the form of the writ of error ; because in the record and process, and the giving judgment of the plaint, &c., (Reg. Bre. 116 ; 8 Co. 157 *b.*) The parol which is called the plaint, is that which depends in plea, namely, all the time until judgment ; for after judgment the suit is not said depending. And all this is entered of record in a roll, which is called the plea-roll ; but the entry of the original writ in the roll is but superfluous, forasmuch as the writ always remains of record, and is sufficient by itself ; but it shall not have any roll, although the contrary is used. Variance in any part of the original writ shall be amended at any time." "Stat. 14, E. 3, c. 6 ; 9 H. 5, c. 4 ; 4 H. 6, c. 3 ; 8 H. 6, c. 12, 15 ; 5 G. 1, c. 13 ;" (8 Co. 156, *b.*)

And again in p. 177, (fol. 56, *a.*) he says, "After the count, the defendant, for his aid to plead better, shall have oyer, if he demand it, of every thing which is not parcel of the record, as of the writ and return thereof ; of an obligation and the condition, and the like."

In *Arthur Blackmore's case*, (8 Co. 156 *b.*, 157 *a.*) Lord Coke says, "So at the common law the judges might amend as well their judgment as any other part of the record, &c., in the same term ; (Co. Lit. 260 *a.* ; 5 Co. 74 *b.*) for during the same term, the record is in the breast of the judges, and not in the roll. But at the common law the misprision of clerks, in another term, in the process, was not amendable by the court ; for in another term the roll is the record ; and therefore by 14 E. 3, c. 6, it is enacted, &c., that no process shall be annulled," &c. "But this statute doth not extend to an original writ, nor to a writ which is in the nature of an original, for that is not included in this word process." "*Recordum*," (in the writ of error) contains "the plea-roll ;" "*Processus*, all the proceedings out of it till judgment." (8 Co. 157 *b.*) "And the first part of the record is the count." (8 Co. 161 *a.*)

Blackstone (3 Bl. Com. 272, 273,) says, the original writ, issued out of chancery, "is the foundation of the jurisdiction of the court ; being the King's warrant to proceed to the determination

of the cause. For it was a maxim, introduced by the Normans, that there should be no proceedings in the common pleas before the King's justices without his original writ; because they held it unfit that those justices, being only substitutes for the crown, should take cognizance of any thing but what was thus expressly referred to their judgment." Flet. b. 2, c. 34; Gilb. Com. Pleas, Introduction, X.; Gilb. Com. Pl. 2; Flet. 58. See also Finch, 198, as to the definition of process, mesne process, and judicial process. Finch, 168, says, "Until the original writ be returned the suit is not said depending," "nor can the courts hold plea but upon an original returned before them."

Gilbert, in his History of the Practice of the Common Pleas, p. 26, says, "The appearance of the plaintiff and defendant *in propria personâ*, at the return of the writ, is recorded by the philazer," (the officer who issues process,) "because he was to continue the process of the court, till the prothonotary took it upon the declaration, this prothonotary sets forth the authority by which the court proceeded, that the court might appear to have cognizance of the cause, and that they pursued their warrant; and therefore in all actions where the first process is by summons, though he did not appear at the return of the summons, and they had issued several mesne writs, yet they only took notice of the summons, and said *summonitus fuit ad respondendum*, and so in trespass, *attachiatus fuit ad respondendum*." (See also p. 96, 97.) And in p. 42, Gilbert says further, "But where there is a variance between the original and the count, or the bond, and oyer prayed, there the variance may be pleaded, because it was usual for the pleaders to show it to the court and have the writ abated; these, taken down by the prothonotary, were the original of those pleas in abatement; but when the recital of the writ and the count itself were entered on record, if there were any material variance, the defendant might take advantage of it, not only by way of plea, but by motion in arrest of judgment after the verdict, or by a writ of error; because the writ being the foundation and warrant of the whole proceedings, if the plaintiff did not pursue it by his count there was no authority to the court to proceed in such cases."

A mistake in the recital of the writ is immaterial after verdict; and if there be a variance between the recital of the writ, and the count, the court, unless the contrary appears, will, after verdict, intend that there was a good original; and that the plaintiff's clerk had made a mistake in the recital of it. *Redmond v. Edlon*, 1 Saund. 317, 318.

Again, in c. 10, p. 86, Gilbert says, "that matter amendable, and matter of form, as the law now stands, will not arrest judg-

ment." And in p. 87, he says, "That part of the count which recites the writ, was amendable at common law;" and in p. 95, "The writ" (meaning the original writ) "is amendable if there be false Latin, if it be only in the form of the writ; but if it be in the substance it shall not be amendable; for the statute gives the court leave, where they have sufficient authority to proceed, to amend the form, but not to make an authority for themselves by altering the substance of the writ." See also Tidd's Pr. 124, and *Davis v. Owen*, 1 B. & P. 343, that the *capias* is no part of the record, and may be amended.

The result of my reflections is this: In England, the reason why a variance, between the original writ and count, was fatal, was because the original writ was the foundation of the authority of the court to take cognizance of the cause, and the warrant to the judges to proceed to judgment. It was necessary that they should pursue their authority strictly. Their acts, if not warranted by the writ, were void. But as these writs have, for a long time, been grantable of common right, (*ex debito justitiæ*), and as the jurisdiction of the courts has been so long established, and precisely ascertained, it became apparent to the whole nation, that a particular warrant to the judges, in every case, was wholly unnecessary, and had become a mere matter of form. The judges themselves, finding that justice was often defeated or delayed by exceptions taken to the accidental variance between the count and the writ, even after the parties had pleaded and gone to trial upon the merits, decided that the defendant should not take advantage of such variance without oyer of the writ; and finally that oyer should not be granted when that was the object; and that if a variance appeared between the recital of the writ and the count, they would, after verdict, intend that there was a good original, which had been misrecited by the misprision of the clerk, so that, at this time, no advantage can, in England, be taken of any such variance.

In that country the judicial power is not separated from the executive. The king is the source of all judicial authority. In theory, he himself is supposed to exercise judicial power. The judges are his delegates or substitutes, and can hear no cause unless it be referred to them by the king, or be brought before them by his order. Hence the necessity, at first, of original writs.

But in this country the judicial power is a separate branch of the national sovereignty. It does not emanate from the executive; and after being organized by the legislature it is independent of both. It exercises its functions *suo jure*, although the jurisdiction of each particular tribunal is described and defined by the legislature at the time of its erection. It is not necessary that each par-

ticular case should be referred to the court by a higher authority. It requires no original writ to warrant its proceedings. Every person has access to it, as of common right. It is bound to hear and determine every case, brought judicially before it, of which it has jurisdiction. The writ which is issued to compel the appearance of the defendant, is what, in England, is called process; issued from the court itself, and not an original writ issuing from another tribunal. Although it may be called the original writ because it is the first writ which issues in the cause, yet it has not the qualities of the English original writ; and no variance between it and the count can abate it, because it is not the foundation of the authority of the court; and if it could be thus abated, the abatement of the process, issuing from the court itself, could not deprive the court of that cognizance of the cause which it must have had before it issued the process.

There is no instance, in the English books, of a plea in abatement, or of an arrest of judgment for variance between the count and the process. Such variance is seldom noticed, unless it affect the interest of third parties, as in bailable cases, or unless it be very material. The mode of taking advantage of such variance, is not by plea, but by motion, either to discharge the bail, or to set aside the proceedings for irregularity. It is a motion to the discretion of the court; not as a matter of strict right; and the court varies the remedy according to the justice of the case. 1 Chitty, Pleadings, 248, 254.

When we find that the English courts have deemed it necessary for the purposes of justice to throw obstacles in the way of taking advantage of a variance between the original writ and the count, and that no advantage, by way of plea, or motion in arrest of judgment can there be taken of a variance between the process and the count, it would seem strange that we, who have no original writ sent to us as the foundation of our jurisdiction, should decide that the process is abated by its variance from the declaration; or that judgment should be arrested for that cause. The English doctrine, respecting the original writ, is wholly inapplicable to our courts; and a doctrine which for its injustice and inconvenience, has been reprobated there, ought not to be gratuitously assumed here. The reason why, in England, judgment was arrested for variance between the original writ and count, was, that the court had no jurisdiction of the cause actually prosecuted; and it is never too late, before judgment, to show that the court has no authority to give the judgment which is asked. But in this country an error in the process does not affect the jurisdiction or authority of the court, especially when the defendant has appeared upon that process and pleaded to the action. The

process is only the means of bringing the defendant into court. If he appear and do not object to the process, nor move to be discharged on account of its irregularity, but submit himself to the jurisdiction of the court, it is immaterial by what sort of process he is brought in.

But it may be asked, shall a man arrested for trespass, be obliged to answer to the plaintiff in an action of debt? In answer, it may be asked, why not here as well as in England? No inconvenience is felt there in this course of proceeding. The only objection would be on behalf of the bail, and he might be relieved on motion.

I think it quite immaterial whether the *capias ad respondendum*, be, or be not, part of the record; for if it be, a variance between it and the count is not fatal, for the reasons before stated; and if it be not a part of the record, the variance does not judicially appear, and cannot be noticed by the Court.

The motion in arrest of judgment is overruled.

INDEX.

ABANDONMENT.

1. The mere stranding of a ship on a bar will not, of itself, justify the abandonment of the ship to the underwriters; and the master and crew are bound to use their best exertions to get her off. *Howland v. Marine Ins. Co. of Alexandria*, 474.
2. If the stranding was of such a character as to render it, in good judgment, hopeless to get the vessel off, then the abandonment was justified, and the loss was within the policy. *Ibid.*
3. An offer, to abandon the insured vessel, made as soon as the assured obtains the preliminary proofs of loss to be laid before the underwriters, is not too late. *Gardner v. The Columbian Ins. Co.* 550.

ABATEMENT.

1. The expiration of the charter of the Bank of the United States abated all suits then pending in the name of the President, Directors, and Company of that bank. *The Bank of the United States v. McLaughlin*, 20.
2. Case will lie for use and occupation of land in Virginia, but all the joint tenants or tenants in common, interested with the plaintiffs, must be joined as plaintiffs in the action; and if they are not, the defendant may take advantage of the omission without pleading it in abatement. *Newton and Muncaster v. Rear-don*, 49.
3. The Court will not receive a plea in abatement, that there are other defendants not taken, unless it be put in upon oath. *Edmondson v. Barrell*, 228.
4. *Quere*, whether the misnomer of a body corporate must be pleaded in abatement. *Central Bank v. Tayloe*, 427.

ABSENT DEBTOR.

1. Upon a chancery attachment in Alexandria County, D. C., against the effects of an absent debtor, the garnishee, residing in Alexandria County, is not liable to the plaintiff for goods of the defendant which are in the custody of the garnishee in Virginia, where the debtor himself resides. *Miller & Son v. Hooe and Janney*, 622.
2. If the resident garnishee is not indebted to the defendant, and has no effects of the defendant in his possession in this District, and the defendant himself is not found in the county of Alexandria, no decree can be rendered against either the garnishee or the debtor, and the bill must be dismissed, as the Court has no jurisdiction in the case. *Ibid.*

ACCOMMODATION.

1. The indorsement of a note is evidence of money had and received by the defendant for the plaintiff's use, although the note was indorsed by the defendant for the accommodation of the maker. *Bank of Alexandria v. W. Wilson*, 5.
2. The plaintiff's counsel may fill up the blank indorsement at the trial, although the defendant indorsed the note for the accommodation of the maker. *Ibid.*

ACCOUNT.

1. If, after the jury is sworn and impanelled, it appear to be a case in which it is necessary to examine and determine upon accounts between the parties, the Court will order the jury to be discharged, and the accounts to be audited and stated by the auditor of the Court, agreeably to the Maryland Act of 1785, ch. 20, § 12, and that he report to the Court. *United States v. Rose*, 567.
2. The creditors of the insolvent estate of a deceased debtor have a right to contest the settlement of the executor's account before the Orphan's Court, and to ap-

ACCOUNT, (*Continued.*)

peal from its decision to this Court. *Nichols and others v. Hodge's Executor*, 567.

ACKNOWLEDGMENT.

1. A deed of land in Maryland acknowledged by the grantor before two justices of the peace of the county in Maryland in which the grantor then resided, not being the county in which the land laid, is not properly recorded under the Act of 1766, ch. 14, unless there were indorsed on the deed a certificate of the clerk of the county under the seal of the court, that the two justices were, at the time, justices of the peace of that county; and such certificate recorded with the deed. *Milligan v. Mayne*, 210.
2. The superintendent of the city of Washington was authorized, by law, to take the acknowledgment of deeds of land within the city. *Peltz v. Clarke*, 703.

ACTION.

1. A justice of the peace is not liable in an action of false imprisonment under an illegal warrant issued by him, unless it be issued maliciously. *Neale v. Minifie*, 16.
2. In an action upon the case for maliciously contriving to deprive the plaintiffs of their slave; it is necessary for them to prove malice in the defendant; and it is competent for the defendant to show probable cause, and the want of malice. *Lewis et al. v. Spalding*, 68.
3. An action upon the case will lie for the loss of the plaintiff's slave although the defendant wrongfully and unlawfully acquired and kept possession of the slave. *Washington v. Wilson*, 153.
4. In an action upon the statute of Virginia for carrying away the plaintiff's slave, evidence will not be permitted to be given that the slave had hired himself as a free man to another master of a vessel in a previous voyage. *Ibid.*
5. An action on the case will lie against a corporation aggregate, for damage done by its agents, ignorantly or negligently; but not if done by the agent knowingly and wilfully. It is not necessary that it should be done under any by-law, or order to the agent; if done by the previous authority or subsequent assent of the corporation, it is liable. *Pritchard v. Corp. of Georgetown*, 191.

ADMINISTRATION.

1. In suits in equity against executors and administrators in Virginia, a lawyer's fee is not to be taxed. *Arrell v. Marsteller*, 11.
2. Under the Act of Maryland, 1798, ch. 101, c. 8, § 15, the court, and not the jury, is to ascertain whether the defendants paid away all the assets before notice of the plaintiff's claim. *Hellen v. Beatty*, 29.
3. An action cannot be maintained under the laws of Virginia upon an administration-bond until a *devastavit* shall have been established in a suit against the administrator. *Gilpin v. Crandell*, 57.
4. A surety in an administration-bond is a competent witness for the administrator. *Thompson v. Afflick*, 46; *Davies v. Davies*, 105; *Craig v. Reintzel*, 128; *Burch v. Spaulding*, 422.
5. A declaration upon a promise made by the defendant must aver assets in order to charge him personally *de bonis propriis*. *Adams v. Whiting*, 132.
6. An executrix has a right to appeal from a sentence of the Orphans' Court, to this Court, without giving security to prosecute the appeal with effect; and this Court will grant a *mandamus* accordingly. *Deneale v. Young*, 200.
7. There can be no judgment in Washington County against an executor or administrator for a debt of the testator or intestate, until the Court shall have ascertained the assets and assessed the sum for which the judgment shall be rendered against the executor or administrator, *de bonis propriis*. *Bank of Washington v. Peltz*, 241.
8. A purchaser under a power given by will to the executor to sell real estate for payment of debts, is not bound to see that the purchase-money is properly distributed among the creditors of the testator. *Greenway v. Roberts*, 246.
9. A justice of the peace has no jurisdiction of an action against an administrator. *Ritchie v. Stone*, 258.
10. Where an administrator is defendant, the Court will permit him to plead the statute of limitations at the trial term; to which plea the plaintiff can make only one replication. *Offutt v. Hall*, 363.

ADMINISTRATION, (*Continued.*)

11. An action will not lie in Alexandria County, against the sureties in an administration-bond, until a *devastavit* shall have been established in a suit against the administrator. *Young v. Mandeville*, 444.
12. If a suit be brought originally against an administrator and he die *pendente lite*, the administrator *de bonis non* may be compelled to appear to defend the suit. *Owen et al. v. Blanchard*, 418.
13. A justice of the peace, under the act of Congress for extending the jurisdiction of justices of the peace, has not jurisdiction of suits against administrators. *Adams v. Kincaid*, 422.
14. An administrator *de bonis non* cannot support an action in his own name for goods of his intestate sold by the previous administrator. *Calder v. Pyfer*, 430.
15. If the administrator of the surety in a collector's bond pay away the assets of his intestate in payment of the intestate's debts before notice of the claim of the United States, such payment is not a *devastavit*. *United States v. Ricketts*, 553.
16. The creditors of the insolvent estate of a deceased debtor have a right to contest the settlement of the executor's account before the Orphans' Court; and to appeal from its decision to this Court. *Nicholls v. Hodge*, 582.
17. The amount of compensation to be allowed to the executor for his services in settling the estate, within the limits of five and ten per cent. on the inventory, is a matter within the exclusive cognizance of the Judge of the Orphans' Court; and while his order upon that subject remains unrepealed it is conclusive against the creditors, and cannot be controverted upon *plene administravit*. *Ibid.*
18. A claim by the executor, as a creditor of the estate, cannot be controverted by the other creditors before the Orphans' Court. That court has no definitive jurisdiction between contending creditors. *Ibid.*
19. If the administratrix of her deceased husband sell the goods and take notes payable to herself personally, and bring suit on one of the notes and die, and her administrator enter his appearance in the suit, and obtain judgment, the Court will not order the judgment to be entered upon the docket for the use of the administrator *de bonis non* of her husband, unless he can show that the sureties of the administratrix are insolvent and that the balance of her administration account is against her. *Mary Ann Magruder's case*, 626.

AFFIDAVIT.

1. An account charging the defendant "To goods per bill, \$91.89," with an affidavit "that the above account is just and true," is not sufficient to hold the defendant to special bail. *Bartleman v. Smarr*, 16.
2. An affidavit "that the within account is just and true as stated" is not sufficient. *Travers v. Hight*, 41.
3. In an action against two defendants upon the promissory note of one of them, an affidavit, by an indifferent witness, that the other defendant acknowledged that he was a partner and equally liable for the debt, is sufficient to hold him to bail. *Miller v. Wheaton & Briscoe*, 41.
4. An affidavit, "that the above account as stated is just and true, and that the plaintiff has not received any part, parcel, or satisfaction for the same," but does not say that the plaintiff had received no security, is sufficient to hold the defendant to bail. *Young v. Moriarty*, 42.
5. The affidavit of a plaintiff who has been discharged under the insolvent act, that the account is just and true as stated, and that he has received no part thereof, &c., must be accompanied by a similar affidavit by his trustee under the insolvent act, or bail will not be required. *Way v. Selby*, 44.
6. The Court will not receive a supplemental affidavit to continue a cause. The affidavit to continue a cause, on the ground of the absence of a witness, must state that the affiant believes that the cause cannot be tried with safety to the party applying for the continuance without the attendance of the witness. *Union Bank of Georgetown v. Riggs*, 204.
7. Upon an attachment issued by a justice of the peace under the Virginia Act of December 26, 1792, § 6, if the plaintiff's claim arise, in part upon a note of the defendant taken up by the plaintiff, who was the indorser, the plaintiff's own affidavit is not sufficient evidence of the debt without producing the note. *Mills v. Wilson*, 216.
8. In order to obtain an attachment under the Maryland Act of 1795, ch. 56, the

AFFIDAVIT, (*Continued.*)

affidavit must be positive as to the amount of the debt. *Munroe v. Cook et al.* 465.

9. The Court has a discretion upon a motion to change the venue; and will not, in general, change it unless the suggestion be accompanied by an affidavit stating the grounds of belief that an impartial trial cannot be had in the county in which the suit is instituted. *Lewis v. Fire Ins. Co.* 500.
10. The affidavit of the President of the Bank of Columbia, made under the 14th section of its charter, stating "that the note was not paid when due, according to the best of his knowledge and belief," and "that the sum of — remained due upon the note," is sufficiently certain, although he does not state that it remained due from the defendant, nor that the defendant is the person who signed the note. *Bank of Columbia v. Cook*, 574.
11. An affidavit of the plaintiffs, written upon the back of a copy of the charter-party, and annexed to an account current which states the particular charge, with dates, &c., and averring that "there is now due and unpaid upon the original charter-party, of which the within is a true copy, \$2,433.06, the whole amount of said charter being \$3,212.96, of which \$779.90 have been paid agreeably to the account current by us signed and hereunto annexed, which exhibits the true and perfect state of the demand now existing between the said Simon-ton and ourselves," is sufficiently certain to hold the defendant to bail, in an action of covenant on the charter-party. *Winter v. Simonton*, 585.
12. In an action upon the case for selling negroes out of the neighborhood contrary to agreement, the defendant will not be held to special bail upon an affidavit stating the breach of the agreement, and the belief of the plaintiff that he has sustained damage to a certain amount. *Young v. Palmer*, 625.
13. An affidavit to hold to bail for a malicious arrest, must state that the action in which the plaintiff was arrested, is determined. *Barrell v. Simonton*, 657.

AGENT.

1. Information, received by an agent of the insured, of the loss of the property before insurance effected, will not vacate the policy, unless that agent is the agent who obtains the insurance or gives the information to the person who obtains it. *Patton v. Janney*, 71.
2. An action upon the case will lie against a corporation aggregate for damage done by its agent, if it be done ignorantly or negligently, but not if done by the agent knowingly and wilfully; and if done by the previous authority or subsequent assent of the corporation, it is liable. It is not necessary that the authority should be given by a by-law or any written order. *Pritchard v. Corporation of Georgetown*, 191.
3. A factor may retain for a general balance due by his principal. *McCobb v. Lindsay & Hill*, 215.
4. If a factor sell in his own name, the vendee cannot set off a claim against the factor's principal, not yet payable. *Ibid.*
5. If the defendant sell personal property as the agent and by authority of the plaintiff and agree to pay the proceeds to him he is liable to the plaintiff therefor, although other persons may have been jointly interested with the plaintiff in the property. *Gray v. Reardon*, 219.
6. If the agency be special the plaintiff must show the transaction to be within the scope of the agency. *Davis v. Robb*, 458.
7. The declarations of the agent, in support of his authority, will not be received in evidence unless cotemporaneous with, and constituting part of, the *res gestæ*. *Ibid.*
8. A declaration upon a note payable to I. S. and averring that I. S. "acting by authority and as agent of said defendant indorsed the said note for and in behalf of the defendant by writing thereon the name of him the said I. S. as agent of the said defendant," should also aver that the note was made payable to the said I. S. as the agent and for and in behalf of the said defendant: otherwise the note will not appear to be indorsed by the said I. S. in the character in which it was made payable to him; and so no title in the plaintiff. *Wilson v. Porter*, 458.
9. If the principal authorize his agent to receive notices for him the authority ceases with his death. A notice given to the agent after the death of his principal will not bind the executors. *Bank of Washington v. Peirson et al.* 685.

AGENT, (*Continued.*)

10. Notice to the agent is notice to the principal. *Kurtz v. Bogenruff et al.* 701.

AGREEMENT.

1. If there be a special agreement, not under seal, and the plaintiff has executed it on his part, exactly according to its terms, he may recover the contract price in an action of *indebitatus assumpsit* for work and labor done, and materials furnished without a special count upon the written agreement. *Brockett v. Hammond*, 56.
2. A contract for the sale of notes of a private bank, if not in writing, is within the statute of frauds. *Riggs v. Magruder*, 143.
3. A verbal agreement which is to be put into writing and signed the next day, is not complete so as to bind either party, until reduced to writing and signed. *Ibid.*

ALIENAGE.

1. Alienage is not a cause of challenge of a juror. *Mima Queen v. Hepburn*, 3.
2. An alien enemy residing here by license of the government of the United States is competent to maintain a personal action; and if residing here before the war, as a mechanic, and continuing so to reside until the time of bringing suit, the jury may presume that he was remaining here under the permission and license of the government, although he had not reported himself according to the President's proclamation. *Otteridge v. Thompson*, 108.
3. An alien is not liable to militia duty. *Slade v. Minor*, 139.
4. Naturalization cannot be proved by parol. *Ibid.*
5. In the year 1796, A covenanted with B to pay rent to the "heirs and assigns" of C, a citizen of the United States, who had died in the year 1785, leaving, as his nearest of kin and heir at law, a sister who was then an alien and a British subject, and who was born and always resided in Scotland. Held, that the executor of B might recover the rents against A in an action of covenant for the use of the sister, notwithstanding her alienage. *Wisc v. Resler*, 182.

ALEXANDRIA.

1. The lots lying west of West Street in Alexandria are liable to be taxed like other lots in the town. *Common Council of Alexandria v. Wise*, 27.
2. The Common Council of Alexandria has no authority to make by-laws operating beyond the limits of the town as described in the Acts of Virginia, of December 13, 1796, and January 8, 1798; and the jurisdiction of the Mayor is confined to the same limits. *Ex parte Jos. Deane*, 125.
3. The Corporation of Alexandria cannot enforce its by-laws by corporal punishments. *Ibid.*
4. A conviction of the offence of keeping a faro-bank contrary to a by-law of the Corporation of Alexandria, is no bar to an indictment at common law for keeping a disorderly house, supported by the same evidence. *United States v. Robin Hood*, 133.
5. The by-law of Alexandria requiring the master to pay a poll-tax for his journeymen, is not repugnant to the general law of the land, and is authorized by the charter. *Morgan v. Rowan*, 148.
6. The Common Council of Alexandria have power, by their by-laws, to prohibit the keeping of gaming tables in the town, under a penalty to be recovered by warrant before the mayor, in the name of the Common Council, and to be levied upon the goods and chattels of the offender, although he may be also liable to prosecution under the laws of Virginia adopted by the Act of Congress of the 27th of Feb. 1801. *McLaughlin v. Stephens*, 148.
7. It is not necessary that an order of the Common Council for the pavement of any particular street should be passed as a by-law, and submitted to the mayor for his approbation. *Common Council of Alexandria v. Mendenhall*, 224.
8. Upon a motion for judgment against the proprietor of lots liable for the expense of paving the street opposite the lots, the Court will not receive evidence that the pavement was badly done. *Ibid.*

AMENDMENT.

1. While the cause is depending in the Supreme Court of the United States, the Circuit Court will not permit the declaration, which was substantially defective, to be amended. *Marsteller v. McClean*, 8.

AMENDMENT, (*Continued.*)

2. After a writ of error returned, the court below can only permit clerical or judicial errors in the process or proceedings to be amended. *Ibid.*
3. The Court will not grant leave to amend the writ by changing the name of one of the plaintiffs. *Comegyss v. Robb*, 141.
4. A clerical error in a writ of *scire facias* may be amended. *Tayloe v. Wharfield*, 248.
5. The mistake of the clerk in misnaming one of the parties, in a commission to take the deposition of a witness, may be amended by the order, in case of the death of the witness before the trial. *Boone v. Janney*, 312.
6. After the jury is sworn to try the issue upon allegations filed against an insolvent debtor, the Court will not permit the allegations to be amended by inserting the name of another creditor. *Walter Newton's case*, 467.
7. If the jury find the amount of rent arrear, in damages, without stating it to be the amount of the rent, the Court will permit the verdict to be so amended by the clerk, after the jury have rendered their verdict and retired from the bar, and even after another cause has been tried. *Arguelles v. Wood*, 579.

AMERCEMENT.

1. If the defendant has been discharged under the insolvent law of the District of Columbia, upon a *capias ad respondendum*, the marshal will be discharged from his amercement for not bringing him in at the return of the writ, upon the defendant's entering his proper-person-appearance. *Trundle v. Heise*, 44.
2. If a defendant, arrested upon a *capias ad respondendum*, be discharged under the insolvent act before the return of the writ, and fails to appear, the marshal cannot be amerced. *Williams v. Craven*, 60.
3. If the marshal fails to bring in the body of the defendant upon the return of the writ, he will be amerced to the full amount of debt or damages and costs, and judgment will be entered therefor *nisi* the second day of the next term. *Winter v. Simonton*, 585.

ANSWER.

1. The answer to a bill in equity, so far as it is responsive to the allegations of the bill, is conclusive evidence, unless contradicted by two witnesses. *Harper v. Dougherty*, 284.
2. Upon a motion to dissolve an injunction, an averment in the answer, not responsive to any allegation in the bill, is not, *per se*, evidence against the complainant. *Robinson v. Cathcart*, 590.
3. An answer of the defendant, in order to be evidence in his favor, must be an answer to a fact averred in the bill, and not an answer to a mere inference of law. *Ibid.*
4. The answer of one defendant is not evidence for another. *Ibid.*
5. If there be several defendants, the Court will not, in general, dissolve the injunction till all have answered. *Ibid.*

APPEAL.

1. Upon an appeal from the judgment of a justice of the peace, the cause is to be tried *de novo*. *Minifie v. Duckworth*, 39.
2. New evidence cannot be heard upon an appeal from the Orphans' Court. *Gittings v. Burch*, 97.
3. An executrix has a right to appeal from a sentence of the Orphans' Court to this Court, without giving security to prosecute the appeal with effect. *Denale's Executrix v. Young*, 200.
4. No appeal lies from the judgment of a justice of the peace imposing a fine for profane swearing in his presence. *Howard v. United States*, 259.
5. No appeal lies to this Court from the judgment of a justice of the peace for a penalty for violating a by-law of Georgetown. *Booth v. Corporation of Georgetown*, 356.
6. *Quære*, whether this Court has jurisdiction of an appeal from the judgment of a justice of the peace upon the verdict of a jury? *Sherburne v. Semmes*, 446.
7. An appeal does not lie to this Court from the judgment of a justice of the peace in a cause which has been tried by a jury before the justice. *Davidson v. Burr*, 515; *Maddox v. Stuart*, 523.
8. In Maryland, in the year 1819, the appellant was not bound to prosecute his appeal and transmit the record until the term next after the approval of the appeal-board. *Scott v. Izor*, 530.
9. The creditors of the insolvent estate of a deceased debtor have a right to contest

APPEAL, (*Continued*.)

the settlement of the executor's account before the Orphans' Court, and to appeal from its decision to this Court. *Nicholls v. Hodge's Executor*, 582.

10. There can be no appeal from the original judgment of the justice after a supersedeas. *Coumbe v. Nairn*, 676.
11. If the justice of the peace had not jurisdiction of the cause, his judgment may be reversed upon appeal, although the cause was tried before him by a jury. *Cross v. Blanford*, 677.

APPRENTICE.

1. A note given for the assignment of the time of an apprentice, being for an illegal consideration, is void. *Walker v. Johnson*, 203.
2. An apprentice bound in Maryland and brought into this District, may be discharged by this Court, who will order him to be bound again by two justices of the peace, to a new master. *Negro Gusty v. Edw. Diggs*, 210.

ARBITRATION.

1. An umpire is not to be called in until the original arbitrators have differed; and is then only to decide the points on which they differ. *Traverse v. Beall*, 113.
2. An umpire must give notice to the parties and to the arbitrators, of the time and place of his proceeding to act upon the subject submitted. *Thornton v. Chapman*, 244.
3. An award signed by J. M. and J. P. I. as an award made in pursuance of a reference to them, will not support an averment of an award or umpirage, made by the said J. P. I. as umpire, upon the failure of the two original arbitrators, J. M. and C. L. N., to deliver their award within the time limited by the bond. *Goldsborough v. McWilliams*, 401.
4. An award not delivered within the time prescribed by the arbitration-bond, is not valid. *Ibid*.
5. Where the time for delivering the award is limited by the arbitration-bond, parol evidence cannot be received to show an extension of the time. *Ibid*.
6. Upon the submission of a cause to arbitration by consent of parties and rule of court, the arbitrators are not bound to give notice to the parties of the time and place of making their award. *Masterson v. Kidwell*, 669.
7. After submitting a cause to arbitration by rule of court, neither party can revoke his submission without consent of the other. *Ibid*.
8. Notice of the filing of the award may be given to the attorney at law of the opposite party. *Ibid*.
9. Want of notice is no ground of exception; but of a motion to set aside the award. *Ibid*.
10. *Querre*, whether a motion to set aside an award must not be made within four days after notice of filing the award? *Ibid*.

ARREST.

1. A debtor discharged under the insolvent law cannot be arrested for a debt contracted before his discharge although not payable till after his discharge. *James Anderson's case*, 243.
2. A justice of the peace in Alexandria county has no power to issue a *capias ad respondendum*, or warrant of arrest for a small debt. *Ex parte T. J. Moore*, 404.
3. An insolvent debtor, arrested for a debt due before his discharge, can only be relieved by the court, or a judge of the court, before whom the process is returnable. *Frere v. Mould*, 407.
4. If a warrant contains, on its face, a cause of arrest within the jurisdiction of the magistrate, and purports to have been issued within the local jurisdiction of the magistrate, and is in other respects formal, the officer is bound to execute it, and resistance is unlawful, although, in fact, the offence was not committed within the local jurisdiction of the magistrate. *United States v. Thompson*, 409.
5. A woman, against whom a justice of the peace has issued a warrant for a small debt, and who is notified by the officer to appear before the justice at a certain time and place named in the warrant, is bound to appear and answer; and if she does not, the justice may proceed *ex parte*, and render judgment against her by default. *O'Neil v. Hogan*, 524.

ASSIGNMENT.

1. The declarations of the assignor, made after the assignment of a close in action,

ASSIGNMENT. (*Continued.*)

- will not be received to defeat the action brought in his name. *Palmer v. Cusson*, 66.
2. The mere possibility of a legacy cannot be assigned. *Cook v. Conway's Executors*, 99.
 3. The person who knowingly takes a dishonored check payable to bearer, takes it subject to the drawer's equity against the person from whom he received it. *Rossard v. Scholfield*, 139.
 4. After a note is taken up by the indorser its negotiability ceases, and he cannot, by transferring the note, assign his right of action at law so as to enable the assignee to sue in his own name. *Swann v. Scholfield*, 140.
 5. After the assignment of a claim upon an open account, the debtor cannot, in an action brought for the use of the assignee, set off a claim against the assignor, arising after notice of the assignment. *Weightman v. Queen*, 172.
 6. Payments made to the original creditor after notice of the assignment of the debt, cannot be given in evidence in a suit brought by the assignee in the name of the original creditor. *Gardner et al. v. Tennison*, 338.
 7. In order to amerce the marshal in debt and cost for not bringing in the body of the defendant, the assignment of the cause of action to the marshal may be made by the attorney and agent of the plaintiff. *Heyer et al. v. Wilson*, 369.
 8. If the payee of a promissory note, after it has been dishonored, assign it to a debtor of the maker, and then give the maker a release, upon his surrendering all his effects to a trustee for the benefit of his creditors, the assignee cannot recover upon the note, in an action against the maker who had no notice of the assignment, until after the deed of trust and release had been executed. *Gelston v. Adams*, 440.
 9. Where there are contending assignees of a cause of action pending in court, the Court will not, on motion, decide the merits of their respective claims by ordering the action to be entered upon the docket as for the use of either of them. *Thomas v. Elliot*, 432.
 10. The assignment and delivery of the bill of lading and invoice of goods *in transitu*, for a valuable consideration, conveys the legal title, and the goods cannot be attached as the property of the assignor. *Bulberson v. Mauro*, 623.

ASSIZE OF BREAD.

If the price of superfine flour be not ascertained and published by the mayor or register, in the last week of the preceding month, the penalty for selling loaves of insufficient weight cannot be recovered. *Friend v. Corporation of Washington*, 19.

ASSUMPSIT.

1. The promise of a *feme covert* is void, and her subsequent promise when *sole*, without a new consideration, is also void. *Watson v. Dunlap*, 14.
2. A promise in writing, without consideration, is void; but the burden of proof of want of consideration, is on the defendant. *Ibid.*
3. The plaintiff cannot give evidence of a consideration different from that alleged in the declaration. *Ibid.*
4. When a contract has been executed, *indebitatus assumpsit* will lie for the amount due upon it. *Meyers v. Pe*, 38; *Brockett v. Hammond*, 56.
5. If the plaintiff does certain work for the defendant's intestate under a special contract to be paid for it by the conveyance of a lot of ground, it is not competent for him in an action of general *indebitatus assumpsit* against the defendant for work and labor done in the lifetime of her intestate, to recover the value thereof without showing fraud in the defendant's intestate in making the contract. *Peterson v. Turner's Administratrix*, 423.
6. *Assumpsit* will lie for the marshal's poundage fees upon a commitment on *certiorari*. *Ringgold v. Glover*, 427.
7. Money paid by one man under a certain contingency which both the payer and payee expected would happen, but which did not happen, may be recovered in an action for money not so received. *Ringgs v. Tappan*, 687.

ATTACHMENT.

1. If the defendant directs the garnishee to pay over the money in his hands to the first attaching creditor, and he agrees to do so, a creditor who afterwards attaches, before the money is paid over, is not entitled to share it with the first attaching creditor. *Kield et al. v. Paine et al.*, 9.

ATTACHMENT, (*Continued.*)

2. In an action for a malicious attachment, the official return of the attachment is not conclusive, but may be contradicted by parol. *Mott v. Smith*, 33.
3. If the indorser of a promissory note accept an order from the indorsee, for the amount of the note, in favor of a third person, a subsequent attachment of the money in the hands of the indorser by a creditor of the indorsee, will not avail him. *Wheteroff v. White*, 96.
4. A judgment against the principal debtor, in a foreign attachment in Pennsylvania, is not evidence, in the District of Columbia, of a debt due by that debtor to the plaintiff. *Rickets et al. v. Henderson*, 157.
5. An attachment for rent not due is superseded by the tenant's discharge under the insolvent law of the District of Columbia, of the 3d of March, 1803, § 5. *Keene v. Jackson*, 166.
6. Upon a common-law attachment under the Virginia statute of the 26th of December, 1792, § 7, the Court may, in its discretion, suffer the principal debtor to appear without bail, and without discharging the attached effects, at the first term after the return of the attachment, to plead to the jurisdiction. *Locke v. Cannon*, 186.
7. The clerk may have an attachment for his fees. *Lee v. Patterson*, 199.
8. The attachment first served is entitled to priority of payment. *Johnson v. Griffith*, 199.
9. The attachment first served on the garnishee binds the effects in his hands, although the marshal has other and prior writs of attachment in his hands at the time of such service. *McCobb v. Tyler*, 199.
10. When the marshal has several writs of attachment put into his hands, he must return all the property as attached on each of them. *English v. Tyler*, 200.
11. *Quære*, whether the writ which first comes to his hands, or the writ first levied, has a preference, or whether the attaching creditor shall come in, *pari passu*. *Ibid.*
12. An attachment under the Maryland Act of 1795, c. 56, against the property of a corporation aggregate will be dissolved by its appearance without bail. *Nicholl v. Savannah Steam Ship Co.* 211.
13. An attachment, by a justice of the peace, under the 6th section of the Virginia Act of 26th December, 1792, can only be issued by a justice of the county in which the defendant resides, or from which he is privately removing, or in which he absconds or conceals himself. *Sears v. Noon*, 220.
14. An attachment under the Maryland Act of 1795, c. 56, will lie against lands and tenements in Alexandria County. *Hough v. Smoot*, 318.
15. In attachments in chancery under the statute of Virginia, the attaching creditors have priority according to the time of service of their respective attachments. *Grigsby v. Love*, 413.
16. An affidavit made before a judge of one of the State courts in order to obtain an attachment under the Maryland Act of 1795, ch. 56, is not sufficient for that purpose, "unless there be thereto annexed a certificate of the clerk of the court of which he is a judge, or a certificate of the governor, chief magistrate, or notary-public of such State, that the said judge hath authority to administer such oath." *Bolton v. White*, 426.
17. In the affidavit and warrant for attachment under the Maryland Act of 1795, c. 56, it is not necessary to state the plaintiff to be a citizen of the United States or of any of the States. *Kurtz v. Jones*, 433.
18. In order to obtain an attachment under the Maryland Act of 1795, c. 56, the affidavit must be positive as to the amount of the debt. *Munroe v. Cocke et al.* 465.
19. When the issue is joined between the plaintiff and the garnishee for himself and his principal, the depositions must be entitled as of a suit between the plaintiff and garnishee, and not between the plaintiff and the principal defendant. *Baker v. Mir*, 525.
20. In an attachment under the Maryland Act of 1795, c. 56, if the garnishee be taken and held to special bail under the 6th section of that act, no judgment can be rendered against him until he has appeared. *Jones v. Kemper*, 535.
21. The *capias* against the garnishee must not be "to answer to the plaintiff in a plea of trespass on the case, &c.;" but to appear at the return of the writ, to make answers to such interrogatories in writing as he should, by rule of court, be

ATTACHMENT, (*Continued.*)

required to answer, touching the property in his possession or charge at the time of serving such writ of attachment, or at any other time; and to render his body to prison, or pay the condemnation money if judgment should pass against him. *Ibid.*

22. A judgment of condemnation may, for irregularity, be set aside at a subsequent term. *Ibid.*
23. In case of an attachment by way of execution, if there be no appearance of the principal debtor or garnishee, or other proceeding at the return term of the writ, the attachment is discontinued. *Bank of Washington v. Brent*, 538.
24. If the garnishee is only one of the members of a mercantile company indebted to the defendant, he cannot be chargeable alone as garnishee; nor can the garnishee be chargeable upon interrogatories, unless he admits that he is indebted to the defendant. *Ellicott v. Smith*, 543.
25. *Quere*, whether the treasurer of the United States can be compelled to appear as garnishee, and is liable to judgment for money in his hands as treasurer. *Averill v. Tucker et al.* 544.
26. An agent for the payment of the salaries of the clerks in an executive department of the government of the United States, is bound to appear as garnishee when summoned. *Ibid.*
27. *Quere*, whether the salary of an officer of the United States is liable to attachment. *Ibid.*
28. If money be deposited in a bank, the cashier is not liable as garnishee of the depositor. *Lewis v. Smith et al.* 571.
29. If the garnishee is not the debtor of the defendant, he is not liable to judgment of condemnation. *Ibid.*
30. If the defendant himself could not recover against the garnishee, the plaintiff cannot. *Ibid.*
31. An attachment under the Maryland Act of 1795, ch. 56, will not lie for a debt under the value of twenty dollars. *Dix v. Nicholls*, 581.
32. Upon a chancery attachment in Alexandria County, D. C., against the effects of an absent debtor, the garnishee, residing in the county of Alexandria, is not liable to the plaintiff for goods of the defendant which are in the garnishee's custody in Virginia, where the debtor himself resides. *Miller v. Hooe et al.* 622.
33. If the resident garnishee is not indebted to the defendant, and has no effects of the defendant in his possession in this District, and the defendant himself is not found in the county of Alexandria, no decree can be rendered against either the garnishee or the debtor, and the bill must be dismissed, as this Court has not jurisdiction in the case. *Ibid.*
34. The assignment and delivery of a bill of lading and invoice of goods *in transitu*, for valuable consideration, convey the legal title; and the goods cannot be attached as the property of the assignor. *Balderston v. Manro*, 623.
35. The Court will set aside a judgment against the garnishee, obtained by surprise at a former term, and will quash the execution issued thereon. *Homans v. Coombs et al.* 681.

ATTORNEY AT LAW.

1. The Court will strike an attorney from the roll for mal-practice, although it be not indictable. *United States v. Porter*, 60.
2. An attorney may, in *assumpsit*, recover his legal fee; but a counsellor of this Court cannot support an action at law against his client for his fee as counsel, although he prove an express promise to pay it. *Law v. Ewell*, 144.
3. If the defendant instruct his attorney to plead the statute of limitations, and he plead it after the rule day, the Court will refuse to order the plea to be stricken out, if the attorney, having been recently admitted to practice, was ignorant of the rule which requires that such a plea should be filed strictly within the rule day. *Witzell v. Bussard*, 252.
4. The Court will, on affidavit, reinstate a cause *non-prossed* on a rule for security for costs laid on the plaintiff who had no attorney in court, his attorney having died and no rule served on the plaintiff to employ new counsel. *Cook v. Beall*, 264.
5. The Court has authority to suspend an attorney of the court from practice for a limited time, or to expel him entirely; and may for that purpose inquire in a

ATTORNEY AT LAW, (*Continued.*)

summary manner as to any charges of mal-practice alleged against him. *Ex parte Levi S. Burr*, 379.

6. If the plaintiff examines his attorney as a witness, he waives his privilege, and upon cross-examination, the attorney is bound to answer generally. *Crittenden v. Strother*, 464.

ATTORNEY OF THE UNITED STATES.

The attorney of the United States for the District of Columbia is not bound by the 2d section of the Maryland Act of 1795, ch. 74, to order writs of *ca. sa.* for fines &c., on the application of the marshal; nor can the marshal order them without the authority of the district attorney, who has a discretion in that respect which the marshal has no right to control. *Levy Court v. Ringgold*, 659.

AUCTIONEER.

An auctioneer's bond, given to the Corporation of Georgetown by its corporate name, is void; it should be given to the mayor only, as required by the by-law. The license must be under the corporate seal. *Corp. of Georgetown v. Baker*, 291.

AUDITOR.

See ACCOUNT, 1. *United States v. Rose*, 567.

AUTHORITY.

1. An authority to indorse notes need not be under seal. *Bank of Washington v. Pearson*, 685.
2. A power to sign any note for the renewal of notes, &c. is a continuing power to indorse notes for renewal, &c. *Ibid.*
3. The authority of an agent to receive notices for his principal, ceases with the death of the principal, and will not bind his executors. *Ibid.*

AWARD.

1. See ARBITRATION, 3, 4, 5. *Goldsborough v. McWilliams*, 401.
2. See *ibid.* 6, 7, 8, 9, 10. *Masterson v. Kidwell*, 699.

BAIL.

1. The defendant had been discharged under the insolvent law of Maryland, in 1809, since the cause of action; the bail produced a copy of the record of discharge and an *exoneretur* was allowed. *Baugh v. Noland*, 2.
2. See AFFIDAVIT, 1. *Bartleman v. Smarr*, 16.
3. *Id.* 2. *Travers v. Hight*, 41.
4. *Id.* 4. *Miller v. Wheaton and Briscoe*, 41.
5. *Id.* 5. *Young v. Moriarty*, 42.
6. *Id.* 6. *Way v. Selby*, 44.
7. The master may justify appearance bail at the second term after exception taken at the rules; *quære.* *Brent v. Brashears*, 59.
8. If the principal has been discharged under the insolvent law of Maryland, the bail will be exonerated. *Burns v. Sim's Bail*, 75.
9. Special bail will be required in an action of covenant for rent, upon a proper affidavit. *Wager v. Lear*, 92.
10. If the principal be discharged under the insolvent act before the bail be fixed, and the bail, being taken in execution, give a note for the amount of the debt, the Court, upon the return of the execution, will, on motion, order the note to be given up to be cancelled. *Bussard v. Warner's Bail*, 111.
11. Bail will not be required in an action upon a replevin-bond, although, in the action of replevin, there had been judgment for a return, &c. *Jenkins v. Porter et al.*, 116.
12. In debt on a bond of more than twelve years standing, bail will be required, the plaintiffs being residents of Virginia. *Craig's Ex'ors v. Hilton*, 116.
13. Bail, in Pennsylvania, may follow their principal into the District of Columbia, and take him out of the custody of the person who has become bail for him in that District; and if the principal be brought into the Circuit Court of that District to be surrendered to the marshal, he will be ordered by the Court to be delivered up to the Pennsylvania bail. *Sharpless v. Knowles*, 129.
14. Bail will not be exonerated upon *scire facias* by the discharge of the principal under the insolvent act, unless the discharge was before the appearance day of the first *scire facias* returned executed, or of the second returned *nihil.* *Munroe v. Towers*, 187.

BAIL. (*Continued.*)

15. If the principal be discharged under the insolvent laws of one of the States after the judgment against him in this Court, and the motion to discharge the bail be made at the return term of the *scire facias* against the bail, the Court will discharge him, upon payment of the costs of the *scire facias*. *King v. Sim*, 234.
16. In order to hold the defendant to bail in debt on a bond, it need not be produced until *oyer* demanded, if there be a sufficient affidavit of debt. *Day v. Hackley*, 251.
17. The Court will not decide upon the merits, on a motion to appear without bail. *Ibid.*
18. The defendant has the whole of the return term to appear in; and if the plaintiff withdraw his action before the end of the term, he cannot maintain a suit upon the bail-bond. *Ringgold v. Renner*, 263.
19. After *scire facias* returned, the bail will be exonerated if the principal be confined in the penitentiary of one of the States before any execution returned against him, and so continue to be confined until the return of the *scire facias*. *Wormsley v. Beedle*, 331.
20. If the marshal, upon a *capias ad respondendum* be amerced debt and cost *nisi*, the defendant may, in or before the next term give bail and exonerate the marshal. *Heyer et al. v. Wilson*, 369.
21. Upon motion of the special bail at the return of the *scire facias*, the Court will set aside the original judgment against the principal, for irregularity, and will quash the *scire facias* against the bail. *Ault v. Elliot, Bail of Morté*, 372.
22. If special bail be taken out of court, by two justices of the peace, by recognizance, there must be two sureties. *Thomas v. Elliot, Bail of Morté*, 432.
23. In an attachment under the Maryland Act of 1795, ch. 56, if the garnishee be taken and held to bail under the 6th section of that act, no judgment can be rendered against him until he has appeared. *Jones v. Kemper*, 535.
24. See AFFIDAVIT, 12. *Winter v. Simonton*, 585.
25. *Id.* 13. *Young v. Palmer*, 625.
26. *Id.* 14. *Burrell v. Simonton*, 657.

BANK.

1. The 11th article of the association called "The Union Bank of Georgetown," which declares that every person, dealing with them, "disavows having recourse on any pretence whatever, to the person or separate property of any present or future member of the company," does not prevent a laborer from recovering judgment at law against the individual members of the association who employed him; but they may be relieved in equity. *Davis v. Beverly and Riggs*, 35.
2. A note of an unincorporated bank, "payable out of the joint funds thereof, and no other," is a promissory-note within the meaning of the Maryland Statute, 1799, ch. 75, § 1. *United States v. Smith*, 111.
3. If a bank discount a note, knowing that it was the intention of the party offering it, that the proceeds should be applied to the discharge of a particular note held by the bank, those proceeds cannot be applied by the bank to the discharge of any other note. *Bank of Alexandria v. Saunders*, 183.
4. The private banking institution, known by the name of the Union Bank of Alexandria, had not, before it obtained its charter, any specific lien on the stock of its stockholders. *North v. Janney*, 188.
5. A party to a note, discounted by a bank, is not bound by the special and particular usage of such bank, unless upon his agreement, express or implied. *Bank of Alexandria v. Davis*, 488.
6. If a bank receives a note to be collected according to the known and established mode of transacting business at that bank, it is not liable to damages for omitting to demand payment on Saturday when the third day of grace was Sunday, it being the known and established mode of transacting business in that bank, in such a case, not to demand payment until Monday. *Patricio Bond v. Farmers' Bank of Alexandria*, 509.
7. If the teller of a bank receive as cash, the check of an individual of good credit upon another bank, in which it afterward appeared that he had no funds: and if, in taking such a check he did only what was usual in the ordinary course of the trade and business of banking, and the usage of banks in like circumstances, his so taking it is not a breach of the condition of his official bond, "to make good to the bank all damages it should sustain through his unfaithfulness or want of care." *The Union Bank v. Maule*, 695.

BANK. (*Continued.*)

8. If the teller of a bank, after receiving, as cash, an invalid check upon another bank, consent to take it as his own, and look to the drawer of the check for the payment of it, he cannot afterwards, without the consent of his bank, return the check and throw it upon them. *Ibid.*
9. *Quare*, whether the official bond of the teller of a branch bank of the United States be void because not taken conformably with the 6th article of the rules and regulations for the government of the Offices of Discount and Deposit of the Bank of the United States. *Bank of United States v. Brent*, 696.
10. The official bond of the teller is not void because executed fourteen days after the teller had entered upon the duties of his office. *Ibid.*

BANK OF ALEXANDRIA.

The Bank of Alexandria in 1807 was bound to demand payment of the maker, and to give notice to the indorser before they could maintain an action against him. *Bank of Alexandria v. Robert Young*, 52.

BANK OF COLUMBIA.

1. An execution issued by order of the president of the Bank of Columbia, without any previous judgment, under the 14th section of its charter, must show upon its face all the facts necessary to justify the clerk in issuing it. *Okely v. Boyd*, 176.
2. An execution ordered by the President of the Bank of Columbia, without judgment, ought not to include the notary's fee for a protest, but if the bank releases the fee, the Court will not quash the execution. *Bank of Columbia v. Bunnell*, 306.
3. But such an execution may include five dollars for an attorney's fee, and the interest which has accrued upon the debt up to the time of ordering the execution. *Ibid.*
4. The affidavit of the president of the Bank of Columbia, made under the 14th section of its charter, stating that "the note was not paid when due, according to the best of his knowledge and belief," and that "the sum of ——— remained due upon the note," is sufficiently certain, although he does not state that it remained due from the defendant, nor that the defendant is the person who signed the note. *Bank of Columbia v. Cook*, 574.
5. Upon the return of an execution issued by order of the president of the Bank of Columbia, the Court will not quash it because it appears on the face of the note that it had been due more than three years before the issuing of the execution. *Ibid.*
6. The Court will permit the defendant, upon the return of the execution issued by the president of the Bank of Columbia, to plead the statute of limitations. *Ibid.*
7. Upon the return of an execution issued by order of the president of the Bank of Columbia, under the 14th section of its charter, if the defendant disputes the debt, the Court will order an issue to be made up, and will permit the defendant to plead the statute of limitations. *Bank of Columbia v. Sweeney*, 704.

BANK OF WASHINGTON.

1. Upon the death of a stockholder in the Bank of Washington, insolvent, and indebted to the United States, the bank has no right to set off the dividends accruing upon his stock after his death, against notes upon which he was indorser. *Brent v. Bank of Washington*, 517.
2. The Bank of Washington has no specific lien upon the dividends of its stockholder, in consequence of its right to prevent the transfer of his stock until his debt to the bank should be paid. *Ibid.*
3. After the death of a customer of the bank, a notice left with the person who was authorized by him, in his lifetime, to receive notices for him, does not bind his executors. *Ibid.*

BANK-NOTES.

1. In a criminal case, bank-notes are not money. *United States v. Wells*, 43.
2. Bank notes are not goods and chattels nor money, and the stealing of them is no offence at common law. *United States v. Noyes Henry Brown*, 133; *United States v. Carnot*, 469.
3. The Court will not order stolen bank-notes to be restored to the person from whom they were stolen: they having been received *bonâ fide* by innocent persons in the way of business. *United States v. Betty Read*, 159.
4. If the owner of a bank-note lose one half of it, he may recover the amount of

BANK-NOTES, (*Continued.*)

the whole note in an action against the bank which issued it, the plaintiff having offered security to indemnify the bank against the claim of any other person upon the lost half. *Armat v. Union Bank of Georgetown*, 180.

BANK OF POTOMAC.

The Bank of Potomac has a lien upon its stock in the hands of a stockholder whose notes are lying over unpaid. *Burford v. Crandell*, 86.

BANK OF UNITED STATES.

The expiration of the charter of the Bank of the United States on the 4th of March 1811, abated all suits then pending in the name of the President, Directors, and Company of that bank. *Bank of the United States v. McLaughlin*, 20.

BARRATRY.

Upon an indictment for barratry no evidence of specific acts can be given without notice. Notice given after the commencement of the trial, is too late. *United States v. Porter*, 60.

BARON AND FEME.

1. It is no fraud in a husband toward his creditors, to purchase a real estate with the money which belonged to the wife before the marriage, and to take the deed directly to the wife, pursuant to a verbal agreement to that effect made with her before the marriage. *Mechanics Bank v. Taylor and Wife*, 507.
2. In trover by husband and wife for a conversion of the wife's goods before marriage, the declaration must conclude *ad damna ipsorum*. *Semmes and Wife v. Sherburne*, 534.
3. Where husband and wife are co-defendants, service upon the husband alone is good service of the *subpœna*. *Robinson v. Cathcart*, 590.

BASTARDY.

A recognizance in a case of bastardy cannot be taken by a justice of the peace, in Virginia, unless upon application of the overseers of the poor. *United States v. Clements*, 30; *United States v. Dick*, 409.

BIGAMY.

1. Upon a trial for bigamy in Alexandria, District of Columbia, the bond given by the defendant to the clerk of the court at Richmond to obtain a marriage license cannot be given in evidence on the part of the United States. *United States v. Lambert*, 137.
2. The fact, that the person who performed the ceremony of marriage was a clergyman authorized to celebrate the rites of matrimony according to the laws of Virginia, may be proved by parol, as any other matter of fact *in pais*; and the record of the testimonial required by the Act of Virginia of 22d of December, 1792, c. 104, § 3, need not be produced; nor a copy thereof. *Ibid.*
3. A person convicted of bigamy in Alexandria, District of Columbia, is entitled to the benefit of clergy; and may be burnt in the hand, and required to recognize for his good behavior. *Ibid.*
4. Upon a trial for bigamy in Alexandria, District of Columbia, the prisoner is entitled to peremptory challenge. *Ibid.*

BILLIARD TABLE.

A person who hires out his billiard table and room for two days is liable to the penalty of the Act of Maryland, 1798, c. 113. *United States v. Duval*, 42.

BILL OF EXCEPTIONS.

The court will not sign a bill of exceptions to the terms in which a certain paper which had been offered in evidence, is described in the instruction of the Court to the jury, (the paper itself being referred to,) but will sign a bill of exceptions to the refusal of the Court to sign the former bill of exceptions. *Smith v. Hoffman*, 651.

BILL OF LADING.

The assignment and delivery of a bill of lading and invoice of goods *in transitu* for a valuable consideration, conveys the legal title, and the goods cannot be attached as the property of the assignor. *Balderston v. Manro*, 623.

BILL OF SALE.

A bill of sale of personal property is valid between the parties to transfer the legal title, although the possession and beneficial interest remain with the vendor. *Washington v. Wesen*, 153.

BILLS AND NOTES.

1. After an indorser is fixed by a proper demand and notice, the neglect of a trustee to sell property conveyed to him as security for the notes, until by depreciation it becomes inadequate security, will not exonerate the indorser. *Bank of Alexandria v. Wilson*, 5.
2. A protest which does not state that the notary-public informed the indorser that payment had been demanded and refused by the maker of the note is not evidence of sufficient notice to charge the indorser. *Ibid.*
3. The day after the expiration of the three days of grace, is soon enough to make the demand and give notice; and it may be made by the notary's clerk who has possession of the note with the plaintiff's assent. *Ibid.*
4. The indorsement of the note is evidence of money had and received by the defendant for the plaintiff's use, although the note was indorsed by the defendant for the accommodation of the maker. *Ibid.*
5. The plaintiff's counsel may fill up the blank indorsement at the trial, although the defendant indorsed the note for the accommodation of the maker. *Bank of the United States v. Roberts*, 15.
6. The indorsee of a promissory note, not payable to order, but expressed to be "negotiable at the Bank of Discount and Deposit," may maintain an action upon it in his own name, against the maker. *Muir v. Jenkins*, 18.
7. The payee of a promissory note who has passed it away and been obliged, by his indorsement, to take it up, may recover the money from the maker, upon a special count. *Reintzel v. Morgan*, 20.
8. If the indorser, knowing that the plaintiff had neglected to give him notice and had received part of the money from the maker, promise to pay the balance if the maker should not, it is a waiver of notice, and he is liable. *Perry v. Rhodes*, 37.
9. Upon a note due 23d - 26th July, demand and notice after the 28th are too late; but demand and notice on the 27th are not. *Lenox et al. v. Wright*, 45.
10. A promissory note, made in Georgetown, District of Columbia, in 1810, payable to C. L. N. or order, at 60 days, negotiable in the Bank of Alexandria, is governed by the laws in force in Alexandria; and the holder, in an action against the maker, must allow all just discounts against the payee before notice of the assignment given to the maker. *Gilman v. King*, 48.
11. An indorser is a competent witness for the maker of a note, to prove that the indorsement was without consideration, and to give credit to the note; but the payee is not a competent witness for the plaintiff. *Ibid.*
12. If the indorser of a note write on the face of it, "credit the drawer," the note and indorsement are not evidence of money had and received by the indorser to the use of the indorsee who had discounted the note and applied the proceeds to the credit of the maker. *Bank of Alexandria v. Young*, 52.
13. The Bank of Alexandria in 1807 was bound to demand payment of the maker, and give notice to the indorser of the non-payment, before they could maintain an action against him. *Ibid.*
14. Demand and notice to the indorser are not necessary in Virginia, if the maker was so insolvent that the notice could be of no use to the defendant. *Riddle v. Mott*, 73.
15. Notice of the non-payment of a note signed by John, is not notice of the non-payment of a note signed by James, unless the party had good reason to believe that the note of James was intended. *Underwood v. Huddleston*, 93.
16. In an action by the indorsee against the indorser of a promissory-note, the maker is a competent witness to prove the contract to be usurious, unless he is interested. *Knowles v. Parrott*, 93.
17. A note of an unincorporated bank, "payable out of the joint funds thereof and no other," is a promissory-note within the meaning of the Maryland Statute 1799, c. 75, § 1. *United States v. Bennett Smith*, 111.
18. Upon a note payable on demand, the cause of action does not accrue until demand made, and if the defendant remove before demand, the act of limitations is no bar. *Lee v. Cassin*, 112.
19. The holder of a promissory note in Alexandria, District of Columbia, has no equity against a remote indorser, unless he has used due diligence to recover the money from the parties who were liable to him at law upon the note. *Dean v. Marsteller*, 121.

BILLS AND NOTES, (*Continued.*)

20. The person who knowingly takes a dishonored check payable to bearer, takes it subject to the drawer's equity against the person from whom he received it. If the holder, at the time of taking the check, knew that the person who gave it to him had no right to give it, he cannot recover against the drawer. *Rounsavil v. Scholfield*, 139.
21. After a note is taken up by the indorser its negotiability ceases, and he cannot, by transferring the note, assign his right of action at law so as to enable the assignee to sue in his own name. *Swann v. Scholfield*, 140.
22. Demand of payment of a promissory-note, on the day after the last day of grace, is too late. *Bedding v. Pic*, 152.
23. The want of notice of non-acceptance is not excused by an understanding between the plaintiff and James, that the bill should not be sent on for acceptance. *Nicholson v. James and Robert Patton*, 164.
24. If the declaration aver a protest for non-acceptance, as well as for non-payment of a foreign bill of exchange, and the action be brought upon the protest for non-payment, it is not necessary that the plaintiff should prove the averment of protest for non-acceptance. *Ibid.*
25. In order to charge Robert on a bill drawn by James in his own name, it is necessary to prove that James and Robert carried on business in partnership under the firm of James. *Prima facie*, it is the sole bill of James. *Ibid.*
26. The right of the United States to summary judgment under the Act of Congress of March 3, 1797, c. 74, § 3, does not extend to suits brought by the United States as indorsees of promissory-notes. *United States v. Blacklock*, 166.
27. Notice to the indorser on the third day of grace, although after bank hours, is too soon. *Auld v. Mandeville*, 167.
28. An indorser who has been discharged by the laches of the plaintiff, is not bound by a promise to pay, unless he knew at the time of his promise, the fact of laches. *Good v. Sprigg*, 172.
29. Demand of payment of a note must be made on the last day of grace. *Auld v. Peyton*, 182.
30. Demand of payment of a note on the third day of grace, after bank hours, and notice to the indorser and protest on the same day, are not too soon if the note is in bank for collection and the maker has been notified thereof; such being the usage of the banks. *Munroe v. Mandeville*, 187.
31. The making of a promissory-note can only be proved by the subscribing witness, if there be one. Evidence of the confession, of the maker, that he owes part of it is not sufficient on the money counts. *Turner v. Green*, 202.
32. A note, given for the assignment of the time of an apprentice, being for an illegal consideration, is void. *Walker v. Johnson*, 203.
33. In an action by the indorsee against the acceptor of an inland bill, the indorser is a competent witness for the defendant to prove usury in the plaintiff's discounting of the bill. *Guther v. Lee*, 205.
34. A note given for the purchase of tickets in an unlawful lottery is void. *Thompson v. Milligan*, 207.
35. If a note be made payable at the house of R. Y. the first indorser, and the notary did not inquire at that house for the maker, or ask whether he had left funds there to pay it, but demanded payment of R. Y. at his house, such demand is not sufficient to enable the plaintiff to recover against the indorsers. *Mechanics Bank v. Lyon*, 217.
36. If a notary public, after demanding payment from the maker of a promissory note, go to the workshop of the indorser and there demand payment, but of whom he does not remember, and thinks he did not see the indorser, this is not sufficient evidence of notice to the indorser, of non-payment by the maker. *Mechanics Bank v. Taylor*, 217.
37. An alteration of the date of a note, whereby the time of payment is prolonged, does not make the note void as to the maker. *Union Bank v. Cook & Clare*, 218.
38. If a note fall due on Saturday, and payment be demanded of the maker on that day: notice to the indorser on Monday is not too late. *Crawford v. Milligan*, 226.
39. If a man lends to his friend his check upon a bank in which he has no funds, upon the assurance of his friend that he will provide funds there to meet it;

BILLS AND NOTES, (*Continued.*)

- and the plaintiff, at the time of receiving it, knew that the drawer of the check at the time of drawing it, had a reasonable expectation that funds would be so placed in the bank, the drawer is entitled to regular notice of the non-payment by the bank. *Mackall v. Goszler*, 240.
40. It is no defence, at law, to an action by the assignee against the maker of a promissory note, that it was given for the purchase of land which the payee had failed to convey to the maker according to his covenant, although the note was assigned to the plaintiff after it was dishonored. *Holy and Suckley v. Rhodes*, 245.
 41. In an action against the last indorser of a promissory note, it is not necessary to prove the prior indorsements. *Whittenore v. Herbert*, 245.
 42. If a note be discounted by the plaintiff for the joint benefit of the maker and indorsers; or if they are jointly interested in the object for which the money was raised, it is not necessary, in order to charge an indorser, to demand payment of the maker, or give notice to the defendant, of the non-payment, although the parties should be interested in unequal proportions, and the defendant should have indorsed as surety for the other parties to the extent that the whole note exceeded his own interest therein. *Bank of Washington v. Way*, 249.
 43. If a note be made payable in sixty days, by the agent of the indorsers for his and their joint accommodation, to be discounted at a bank who refuse to discount it unless made payable in forty-five days, the maker may alter it accordingly, provided it be done at the request, or with the consent or subsequent approbation of the defendant and the other indorsers and they receive the benefit of the discount; but the burden of proof of such consent or subsequent approbation lies on the plaintiff, and is not to be inferred from the mere circumstance of the defendant's afterward participating in the benefit of the discount. *Ibid.*
 44. The maker of a note cannot be compelled to testify for the plaintiff in an action against the indorser; but the maker's letter to the plaintiff inclosing the note for discount may be read in evidence. *Ibid.*
 45. To support an action against the maker of a note payable at a particular place, it is not necessary to prove a demand of payment at that place. *Brown v. Piatt*, 253; *Smith v. Johnson*, 645.
 46. It is a sufficient excuse for not giving notice to the indorser, of the non-payment of a promissory note by the maker, that the holder called at the usual place of business of the indorser, in business hours, and found it shut, and no person there to receive notice. *Bowie & Kurtz v. Blacklock*, 265.
 47. According to the usage of the banks in the District of Columbia, it is not necessary to demand payment of a note discounted at any of the said banks, until the day after the last day of grace. *Brent v. Coyle*, 287.
 48. If the maker of a note die before the note becomes payable, a demand of payment made upon his widow at the last place of his abode, is *prima facie* a sufficient demand to charge the indorser; there being no evidence that there was an executor or administrator; but if there be actually an executor or administrator, the demand must be made upon him; the burden of proof, however, that there was an executor or administrator lies on the defendant. *Bank of Washington v. Reynolds*, 289.
 49. In a declaration upon a bill of exchange payable to "Lapeyre, Farrowith, & Co." all the persons composing the firm, must be named with an averment that they were joint partners or joint traders under the name and firm of Lapeyre, Farrowith, & Co., otherwise the bill of exchange cannot be received in evidence. *Lapeyre, Farrowith, & Co. v. Gales*, 291.
 50. If payment of a promissory note be demanded of the maker on the third day of grace after banking hours, and notice of the non-payment be given to the indorser on the next day, the demand is not too soon, nor the notice too late. *Bank of the Metropolis v. Walker*, 294; *Read v. Carly*, 417.
 51. The payee, indorser of a lost inland bill of exchange, is not liable to the indorsee, unless the latter has offered indemnity to the drawer and indorser against the lost bill, and demanded a new bill from the drawer. *Riggs v. Graff*, 298.
 52. Taking sixty-four days' discount, upon discounting a note payable at sixty days, is not usury. *Union Bank v. Goszler*, 349; *Bank of the United States v. Crabb*, 299.

BILLS AND NOTES, (*Continued.*)

53. If a promissory note payable at a certain day, be indorsed and passed away after its day of payment, it is then a note payable on demand; and demand and notice are necessary to charge the indorser, although he knew the maker to be insolvent at the time he indorsed it. *Stewart v. French*, 300.
54. If Saturday be the last day of grace of a promissory note, and payment thereof be demanded on that day of the maker in Georgetown, District of Columbia, in time to give notice by the mail of the same evening to the indorser living in the city of Washington, notice, put into the Georgetown post-office for the evening mail of the following Monday, is too late. *King v. Foyles*, 303.
55. If the maker of a promissory note dated at the city of Washington, reside two miles out of the city, but within the county of Washington, and being a clerk in one of the executive departments of the government of the United States, and usually employed from ten to three o'clock in a room in the public executive buildings with other clerks, comes, for that purpose, into the city in the morning and returns to his house in the country in the evening, his absence from the room in the executive buildings at the time the notary called to demand payment of the note, although within the usual hours of public business, was no excuse for not making a personal demand, or a demand at his dwelling-house. A demand of the bar-keeper of a tavern to which the livery stable is attached, in which he occasionally left his horse while at the office, is not a sufficient demand. *Goldsborough v. Jones*, 305.
56. A verbal notice to the indorser on the 18th, (being the day after the last day of grace,) that payment had been demanded of the maker on the 17th, and that the note would be protested if not paid on that day (the 18th,) is not a sufficient notice to charge the indorser. *Bank of the United States v. Barry*, 307.
57. When the indorser of a promissory note has a public office in town, in which he generally attends every day, and in his absence has a servant there to receive messages, &c., a notice, put into the post-office of that town directed to the indorser, is not sufficient notice to charge him, without proof that he actually received it in due time, although the indorser's family reside five miles out of town; and the town post-office is the nearest post-office, and the one to which letters for him are generally directed. *Vowell v. Patton*, 312.
58. Demand of payment, on the 5th of July, of a note due on the 1st-4th of July, is too late to charge the indorser, and the insolvency of the maker will not excuse the delay. *Neale v. Peyton*, 313.
59. If an inland bill of exchange be signed thus — "Witness my hand and seal, W. D. [L. s.]" these words may be rejected as surplusage, and the declaration may be in the usual form as upon the custom of merchants. *Irwin v. Brown*, 314.
60. If the last day of grace be Sunday, the demand must be made on Saturday, and the notice may be given on Monday. *Ibid.*
61. If a promissory note be indorsed in blank, after it has been dishonored, with a parol agreement between the indorser and the indorsee that the indorsers should not be liable unless in the case of the maker's insolvency, it is competent for the defendant to prove such agreement by parol evidence. *Taylor v. Scholfield*, 315.
62. In an action against the indorser of a note which, in the body of it, is made payable at a particular bank, the declaration must aver a demand of payment at that bank. *Bank of the United States v. Smith*, 319.
63. According to the usage and practice of the banks and notaries-public in the county of Washington, District of Columbia, demand of payment of a promissory note and notice to the indorser, on the day after the last day of grace, is not too late to charge indorsers resident in that county having a knowledge of such usage and practice at the time of indorsing. *Smith et al. v. Glover*, 334.
64. If an indorser after suit brought against him, tell a stranger he is ready and willing to pay the debt if he knew the amount of the costs and to whom to pay it; this will not dispense with proof of demand and notice; or of the defendant's knowledge that he was discharged by the want of due demand and notice, nor with proof of the defendant's handwriting on the note, although the note was filed in the clerk's office before the supposed acknowledgment, nor will it be sufficient evidence to sustain any of the money counts. *Gassaway v. Jones*, 334.

BILLS AND NOTES, (*Continued.*)

65. According to the laws of Pennsylvania, the equity follows a promissory note into the hands of an indorsee, unless dated at Philadelphia, and made payable "without defalcation." The words, "without defalcation," do not prevent the maker of a Pennsylvania note from showing fraud in the payee in obtaining the note. *The Commercial & F. Bank v. Patterson*, 346.
66. In an action by the indorsee against the maker of a promissory note, the declarations of the payee before he parted with the note, are competent evidence for the defendant; but not those made after he passed it away. *Ibid.*
67. The addition by the plaintiffs or the payees, of the word and letters, "Washington, D. C." to the signature of the maker without his consent, and with the intent to use that word and those letters as a part of the date of the note, (which was really made in Perryopolis in Pennsylvania,) with intent to make it negotiable according to the laws then in force in the District of Columbia, is a material alteration of the note, and makes it void. *Ibid.*
68. A bond to convey land is a good consideration for a promissory note given for the purchase-money; although the payee who had given the bond, had not the legal title, and could not convey it when the note became payable. The indorsee of the note, who has the legal title to the land, and the power to convey it, may maintain an action against the maker, without tendering a title. *Lane v. Dyer*, 349.
69. If there are several actions against the maker and indorser of a promissory note, and judgment for the debt and costs be rendered against the maker, who pays the same, the indorser will not be permitted to give evidence of such payment, until the costs be paid in the action against the indorser. *Ott v. Jones*, 351.
70. Notice to the indorser, put into the post-office at Washington, for the defendant in Alexandria, on the day after the last day of grace, after the closing of the mail of that day, is too late. *Bank of United States v. Swann*, 368.
71. If the notary, not finding the indorser at home, leave a written notice with some one of his family, it is sufficient. *Cana v. Friend*, 370.
72. If the payee of a promissory note payable to order, indorse it after it has been dishonored, he thereby becomes the drawer of a new bill upon the maker in favor of the indorsee, and is not liable to such indorsee without demand and notice; but he cannot set up, against a remote indorsee, an agreement with his immediate indorsee, not appearing upon the note itself. *Cox v. Jones*, 370.
73. A partial failure of consideration does not make the note void at law, unless accompanied by fraud. *Boone v. Queen*, 371; *Varnum v. Mauro*, 425.
74. If a note vary substantially from that described in the declaration, it cannot be given in evidence upon a writ of inquiry. *Farmers Bank of Alexandria v. Lloyd*, 411.
75. See ASSIGNMENT, 8. *Gelston v. Adams*, 440.
76. A public officer who buys a bill of exchange for public use, and agrees to pay for it when it should be duly honored, is not personally responsible. *Stone v. Mason*, 431.
77. Demand must be made of both makers of a joint and several promissory note, although one of them reside out of the jurisdiction of this court. *Taylor v. Davidson*, 434.
78. It is not necessary that payment of a promissory note should be demanded by a notary public; the demand may be made by any other agent of the holder. *Ibid.*
79. If, at the time of the defendant's indorsement, it was understood by him and the plaintiff that the indorsement was not to give credit to the note, but only to comply with the forms of plaintiff's business as auctioneer, he cannot recover upon the note. *Corcoran v. Hodges*, 452.
80. The acceptor of an inland bill of exchange, after being released by the defendant from liability for the costs of the suit, is a competent witness for the defendant to prove that the bill was drawn by the defendant for the accommodation of the plaintiff, and without any consideration. *Knowles v. Stewart*, 457.
81. A declaration upon a note payable to J. S., averring that he indorsed it as the agent of the defendant, should also aver that it was made payable to him as agent. *Wilson v. Porter*, 458.
82. If a note be payable at a bank, it is a sufficient demand of payment of the maker, if the holder on the last day of grace demand payment at the bank; and the

BILLS AND NOTES. (*Continued.*)

- note is dishonored if the maker has no funds there to pay it. *Bank United States v. Oneale*, 466.
83. When a place of payment is inserted in the body of the note, it is not necessary in an action by the payee against the maker, to prove a demand of payment at the place named in the note. *Beverly v. Beverly*, 470.
 84. A party to a note discounted at a bank, is not bound by the special and particular usage of such bank, unless upon his agreement, express or implied. *Bank of Alexandria v. Deneale*, 488.
 85. If the indorser of a note dated at Georgetown, District of Columbia, and held by a bank in that town, resides in the country, two or three miles from the bank, but has a house or place of business within half a mile of the bank, where it was generally known, and especially known to the runner of the bank, that he kept his account-books, and received his ordinary bank notices, newspaper, and foreign letters, &c.; a notice left for him at the post-office in Georgetown, and directed to him at Georgetown, although that was his nearest post-office, and the one from which he usually received his letters which came by the mail, is not a sufficient notice to charge him as indorser, unless conformable to a well established usage of the bank known to the defendant at the time of his indorsement. *Bank of Columbia v. Lawrence*, 510.
 86. See BANK OF WASHINGTON. 1. *Brent v. Bank of Washington*, 517.
 87. If Sunday be the last day of grace on a promissory note, demand on Saturday is not too soon, and notice on Monday not too late. *McElroy v. English*, 528.
 88. If a note be payable at a certain bank, and payment be there demanded, it is not necessary to make a personal demand upon the maker in order to charge the indorser. *Bank of the Metropolis v. Brent*, 530.
 89. In an action against the indorser of a promissory note, made in the name of a firm, it is not material that the partnership of the makers had been dissolved before the making of the note, it being the renewal of a note given during the existence of the partnership. *Greatrake v. Brown*, 541.
 90. Demand of payment on one of the firm is sufficient to charge the indorser. *Ibid.*
 91. A written notice left at the dwelling-house of the defendant is sufficient. *Ibid.*
 92. If the maker of a note is not found at his office or at his dwelling-house, on the last day of grace, so that payment of the note cannot be demanded, the note is dishonored. *Ibid.*
 93. In an action by the payee against the maker of a promissory note, the plaintiff has a right at the trial, before offering the note in evidence, to strike out the names of the indorsers. *Oneale v. Beall*, 569.
 94. If the indorser of a note, payable on the 8th – 11th of October, die intestate, on the ninth, notice of non-payment left with his son at the counting-house of the deceased on the 11th is sufficient. *Bank of Columbia v. King*, 570.
 95. If a note become payable on the 15th – 18th of October, a like notice left on the 18th is sufficient, no administration having been granted before that day. *Ibid.*
 96. But if a note become payable on the 22d – 25th of October, a like notice, left at the same place, is not sufficient, the administrator having a separate place of business in another part of the town. *Ibid.*
 97. If a bank receives a note to be collected according to the known and established mode of transacting business at that bank, it is not liable for damages by omitting to demand payment on Saturday, when the third day of grace was Sunday, it being the established mode of transacting business in that bank, in such a case, not to demand payment until Monday. *Patriotic Bank v. Farmers Bank*, 560.
 98. In an action against the indorser of a promissory note, payable sixty days after date, *non assumpt infra tres annos*, is a bad plea upon general demurrer; it ought to be *actio non accerit*. *Bank of Columbia v. Ott*, 575.
 99. A note payable in sixty days, "with interest from date," will not support a declaration upon a note payable in sixty days without interest. *Coyle v. Gozzler*, 625.
 100. If an intermediate indorsement be averred in the declaration, it must be proved at the trial, although the suit be brought for the use of such intermediate indorser. *Ibid.*

BILLS AND NOTES, (Continued.)

101. A special custom of the banks and merchants in the county of Washington, District of Columbia, to demand payment on the day after the last day of grace, may be given in evidence without being averred in the declaration. *Ibid.*
102. If a promissory note with a blank indorsement be put into the hands of an attorney for collection, and he die, and the note cannot be found after diligent search among his papers, secondary evidence may be given of the contents of the note. *Patriotic Bank v. Little*, 627.
103. A promissory note, given as collateral or counter security against a note borrowed, is not discharged or vacated by the borrower's discharging or taking up the borrowed note with funds furnished by the lender. *Smith v. Johnson*, 645.
104. An authority to indorse notes, need not be under seal. *Bank of Washington v. Peirson*, 685.
105. A power to sign any note for the renewal of notes, is a continuing power. *Ibid.*
106. If the maker of a note die before its maturity, and the indorser becomes his administrator, no demand or notice is necessary to charge the indorser. *Union Bank v. Magruder*, 687.

BONDS.

1. If the plaintiff deliver his *fiery facias* to the marshal, and die, and the marshal levy it upon the goods of the defendant, he has a right, under the law of Virginia, to give a forthcoming bond, payable to the deceased creditor; and such bond will support a judgment on motion by the administrator of the creditor. *Entwisle v. Bussard*, 331.
2. The surety in an official bond conditioned that the principal shall faithfully execute the duties of his office, is not liable for the honest error in judgment, or want of skill, of the principal. But gross negligence is want of fidelity. *Common Council of Alexandria v. Corse*, 363.
3. If the creditor, having the bond of his debtor with a surety, take a new security payable at a day beyond the time of payment of the bond without the consent of the surety, with the understanding that he was not to trouble the principal for the money, unless the new security should prove to be good for nothing, the surety is discharged, and his remedy is in equity. *Smith v. Crease*, 481.

BOOKS AND PAPERS.

1. Judgment by default for not producing, at the trial, a paper which the defendant has been notified to produce, cannot be rendered unless there has been a previous order of the Court to produce it, founded upon a motion and notice. *Maye v. Carbery*, 336; *Bank of the United States v. Kurtz*, 342.
2. Upon motion of the plaintiff and notice, the Court will order the defendant to produce books and papers on a certain day before the trial, that the plaintiff may have an opportunity to inspect them. *Central Bank v. Tayloe*, 427.

BURGLARY.

- A store-house, not within the curtilage, but in which the clerk of the owner usually sleeps, is in law the mansion-house of the owner, and burglary may be committed therein. *United States v. Johnson*, 21.

BY-LAW.

1. The receipt of the dog-tax, after suit brought, is a waiver of the penalty. *Boswell v. Corporation of Washington*, 18.
2. The by-law of Georgetown, prescribing a penalty for keeping a public gaming-table, does not supersede nor repeal the Maryland Act of 1797, c. 110, prescribing a penalty for keeping a faro-table in a house occupied by a tavern-keeper. *United States v. Wells*, 45.
3. The Common Council of Alexandria has no authority to make by-laws operating beyond the limits of the town, as described in the Acts of Virginia of December 13, 1796, and January 8th, 1798, and the jurisdiction of the mayor is confined to the same limits. Nor can the corporation enforce its by-laws by corporal punishments. *Ex parte Joseph Deane*, 125.
4. A conviction of the offence of keeping a faro-bank, contrary to a by-law of the Corporation of Alexandria, is no bar to an indictment at common law for keeping a disorderly house, supported by the same evidence. *United States v. Robin Hood*, 133.

BY-LAW, (*Continued.*)

5. The by-law of Alexandria, requiring a master to pay a poll-tax for his journey-men, is not repugnant to the general law of the land, and is authorized by the charter. *Morgan v. Rowan*, 148.
6. The Common Council of Alexandria have power to prohibit by their by-laws, the keeping of gaming tables in the town under a penalty to be recovered by warrant before the mayor, in the name of the Common Council, and to be levied upon the goods and chattels of the offender, although he may be also liable to prosecution under the laws of Virginia, adopted by the Act of Congress of the 27th of February, 1801. *McLaughlin v. Stephens*, 148.
7. See ACTIONS, 5. *Pritchard v. Corporation of Georgetown*, 191.
8. It is not necessary that an order of the Common Council for the pavement of any particular street in Alexandria, should be passed as a by-law and submitted to the mayor for his approbation. *Common Council of Alexandria v. Mandeville*, 224.
9. The by-law of Washington of the 14th of April, 1821, which prescribes the terms on which free colored persons may reside in the city, is not, in its prospective operation, repugnant to the Constitution of the United States. *Billy Costin v. Corporation of Washington*, 254.
10. The warrant of a justice of the peace for the violation of a by-law, must set forth the offence substantially within the purview of the by-law. *White v. Corporation of Washington*, 337.
11. A warrant for the violation of a by-law should specify the by-law, and the manner of violating it. So should the judgment. *Boothe v. Corporation of Georgetown*, 356.
12. No appeal lies to this Court from the judgment of a justice of the peace for the penalty of a by-law of Georgetown. *Ibid.*
13. Upon appeal from the judgment of a justice of the peace for the penalty of a by-law, the judgment will be reversed with costs, if the warrant does not set forth the offence with sufficient certainty. *Delaney v. Corporation of Washington*, 459.
14. A warrant charging that the defendant "did, during the last or present month, sell spirituous or other liquor without a license, contrary to the act or acts of the mayor, &c., on that subject made and provided," is too vague and uncertain to support a conviction. *Ibid.*
15. Rye-chop is not "provisions," nor an article of food within the meaning of the by-law of Washington of October 6, 1802. To constitute the offence, it is not necessary that there should be any market holding at the time of the purchase. *Botelov v. Corporation of Washington*, 676.
16. A warrant issued by a justice of the peace for the penalty of a by-law, ought to state all the circumstances required by the by-law, to constitute the offence; but the Court will disregard all such defects as would be disregarded after verdict in an action of debt, or information, upon a penal statute. *McGunnigle v. Corporation of Washington*, 460.

CASE STATED.

In a case stated, the Court cannot infer any fact, as they may upon a demurrer to evidence. *Bank of Alexandria v. Deneale*, 488.

CHALLENGE.

1. Alienage is not a cause of challenge of a juror. *Mina Queen v. Hepburn*, 3.
2. Challenge for favor is to be tried by the two first jurors who are sworn in the cause. *Ibid.*
3. Peremptory challenge is allowed in manslaughter. *United States v. Craig*, 36.
4. Peremptory challenge is not allowed except in capital cases. *United States v. Smithers*, 38.
5. Peremptory challenge allowed in larceny in Alexandria, District of Columbia. *United States v. Negro Peter*, 98; *United States v. Gee*, 163.
6. Peremptory challenge allowed in bigamy in Alexandria. *United States v. Lambert*, 137.
7. Peremptory challenge allowed in Alexandria, for counterfeiting a bank-note. *United States v. Wood*, 164.
8. Peremptory challenge allowed where the punishment may be death. *United States v. Black*, 195.

CHALLENGE, (Continued.)

9. Peremptory challenge not allowed in Washington in horse stealing. *United States v. Krouse*, 252.
10. Peremptory challenge allowed in Washington in cases of freedom. *Negro Matilda v. Mason*, 343.
11. It is a good cause of challenge for favor in a capital case, that the juror is a quaker, and has conscientious scruples as to the lawfulness of taking away human life for any offence. *United States v. Betsy Ware*, 477.

CHARTER-PARTY.

1. In a charter-party, the words "charter and to freight let," do not imply a covenant in law, that the vessel is or shall be seaworthy. *Bowie and Kurtz v. Wheelwright*, 167.
2. See **AFFIDAVIT**, 12. *Winter v. Simonton*, 585.

CHEAT.

- Upon conviction of cheating at cards in Alexandria, the jury will assess the fine at five times the value lost, and the Court will add imprisonment. *United States v. Bascadore*, 25.

CIRCULATING MEDIUM.

- If the president of the "Independent Manufacturing Company of Baltimore," passed away the notes of that company for the purpose of putting them into circulation as a current circulating medium, and not for goods and for the use of the company in the ordinary course of their business, with a view to defraud or injure any person, he was guilty of an indictable offence. *United States v. Ray*, 141.

CLERK.

1. The clerk of this Court for the County of Alexandria may have an attachment for non-payment of his fees. *Lee v. Patterson*, 199.
2. The clerk of this Court is not liable for the honest error of judgment of his deputy, if the deputy was a person of good understanding and correct demeanor, and capable of performing with propriety and correctness the duties of a deputy-clerk; and if the defendant has been guilty of no negligence in superintending his deputy in the discharge of the duties of his office. *Patons and Butcher v. Lee*, 646.
3. The clerks employed in the offices of the several departments of the Government are not liable to militia duty. *Ex parte W. S. Smith*, 693.

COLLECTOR.

1. The collector of city taxes who was appointed and gave bond in June, 1816, and resigned in October, 1816, was liable, upon that bond, for all collections of taxes made by him after the date of the bond and before his resignation, although such collection consisted of arrearages of taxes due in former years. *Corporation of Washington v. Walker*, 293.
2. If the administrator of a surety in a collector's bond pay away the assets of his intestate in payment of the intestate's debts before notice of the claim of the United States, such payment is not a *devastavit*. *United States v. Rickett's Administrator*, 553.
3. The United States, in an action upon a collector's bond, cannot obtain judgment against the surety for more than the penalty of the bond. *Ibid*.

CONFESSION.

1. The confession of a prisoner, taken on oath, cannot be used against him on his trial. *United States v. Bascadore*, 30.
2. A confession, made under the influence of hope or fear, cannot be given in evidence against him upon his trial. *United States v. Pocklington*, 293; *United States v. Negro Charles*, 75.
3. Subsequent confessions, after having confessed under the influence of hope or fear, cannot be given in evidence. *Ibid*.
4. Grand jurors may testify as to the confessions made by the prisoner before them upon oath when under examination as a witness against another person. *Ibid*.
5. In treason, the confession of the prisoner that he did the overt act charged, cannot be given in evidence against him on his trial. *United States v. Lee*, 104.
6. The making of a promissory note can only be proved by the subscribing witness, if there be one. Evidence of the confession of the maker, that he owes part of it, is not sufficient on the money counts. *Turner v. Green and Johnson*, 202.

CONFESSION, (*Continued.*)

7. Although a confession, made under a promise of favor, is not, of itself, evidence against the prisoner; yet the fact that the prisoner went to the place where the property was secreted, and identified it, is evidence against him. *United States v. Negro Richard*, 439.

CONSIDERATION.

1. The promise of a *feme covert* is void, and her subsequent promise, when sole, without a new consideration, is also void. *Watson v. Dunlap*, 14.
2. A promise in writing, without consideration, is void. *Ibid.*
3. The burden of proof of want of consideration of a written promise is on the defendant. *Ibid.*
4. The plaintiff cannot give evidence of a consideration different from that laid in the declaration. *Ibid.*
5. A covenant upon an unlawful consideration will not support an action. *Holmead v. Maddox*, 161.
6. A note given for a ticket in a prohibited lottery will not maintain an action. *Hawkins v. Cox*, 173; *Thompson v. Milligan*, 207.
7. A note given for the assignment of an apprentice is void. *Walker v. Johnson*, 203.
8. A covenant to convey land is a good consideration of a note given for the purchase-money, and it is no defence at law that the vendor failed to convey according to his covenant. *Holy et al. v. Rhodes*, 245; *Lane v. Dyer*, 349.
9. The feeding and training of a race-horse is not an immoral consideration, and will support an assumpsit to pay for the same. *Maddox v. Thornton*, 260.
10. If a deed be made for a valuable consideration, it is competent for a person claiming under it to show a money consideration. *Munro v. Robertson*, 262.
11. A woman who keeps prostitutes for gain cannot recover in an action against them for boarding and lodging. *Mackbee v. Griffith*, 336.
12. A partial failure of consideration is no defence to an action by the payee against the maker of a promissory note. *Varnum v. Mauro*, 425; *Boone v. Queen*, 371.
13. Forbearance, at the request of one partner, to arrest the other partner for a partnership debt, is a good consideration of a promise to pay. *Rice v. Barry*, 447.

CONSOLIDATION.

1. If the writ be issued against two defendants, and one only be taken on the first writ, and the other be afterwards taken on an *alias* or *pluries*, the cause against the defendant first taken will be consolidated with that against the other defendant, although there may have been an intermission of a term between the issuing of the first and second or other writ. *Smith v. Woodward and Yerby*, 226.
2. In an action against two defendants, if one be taken and issue be joined, and plea waived, and judgment confessed against him after the other has been taken, and before the cause is at issue against him; the first judgment may be set aside for irregularity, and the two causes consolidated, and the issues be made up and set for trial. *Hyer et al. v. Wilson*, 633.

CONSPIRACY.

In an action on the case for maliciously conspiring to deprive the plaintiffs of their slave, it is necessary for them to prove malice in the defendant; and it is competent for the defendant to show probable cause, and the want of malice. *Lewis et al. v. Spalding*, 68.

CONSTABLE.

1. In a prosecution against a constable for wantonly sacrificing property taken under execution, the jury cannot find him guilty unless he acted from a corrupt motive. *United States v. Bill*, 202.
2. A constable is not justified in breaking into a dwelling-house, by a warrant from a justice of the peace, to search for goods clandestinely removed by a tenant to deprive his landlord of his remedy by distress for rent. *Wells v. Hubbard*, 292.
3. A constable, in levying a distress for rent in the County of Alexandria, D. C., is not acting in the discharge of his official duty as constable, and can justify by those acts only which would have justified the landlord himself, if he had personally distrained. *United States v. Elze Williams*, 438.
4. A constable's official bond is not vacated or rendered void by his temporary removal from office, but covers his official conduct after his reinstatement in office, as well as before the suspension of his functions. *United States v. Bill*, 518.

CONTINUANCE.

1. If, upon a motion for the continuance of a cause upon affidavit that a material witness is absent, the opposite party, to prevent the continuance, admits that the absent witness, if present, would testify as stated in the affidavit, he is not thereby precluded from offering evidence, at the trial, to disprove or explain away the force of the testimony which he has admitted that the absent witness would give. *Bastor v. Sardo*, 260.
2. If the notice of a motion for an order to produce books and papers at the trial, be not given until the cause is called for trial at the last calling of the docket, the Court will continue the cause until the next term. *Bank of the United States v. Kurtz*, 342.

CONTRACT.

1. When a contract has been executed, *indebitatus assumpsit* will lie for the amount due upon it. *Maupin v. Pic*, 38.
2. If the vendee of land bring a bill to vacate the contract because the title has been adjudged defective, the defendant may resist a decree by showing himself to be now ready to make a good title, if time be not of the essence of the contract, although a former bill by the vendor for a specific performance had been dismissed on account of the defect of title. *Dunlop & Co. v. Hepburn and Dundas*, 86.
3. If the defendant positively refuse to deliver corn according to contract, such refusal dispenses with the necessity of demand and notice on the part of the plaintiff, and of proof of the averment that he was ready at the landing to receive the corn. *Somers v. Tayloe*, 138.
4. A third person, who, at the request of the contractor, executes the contract, cannot maintain an action against the contractor, upon that contract. *Jones v. Smoot*, 207.
5. A general usage among ship-owners and underwriters, in relation to the settlement of average loss, if known to the parties, becomes part of the contract, and binds them. *Sanderson v. Col. Ins. Co.* 218.
6. No executory contract between a master and his slave can be enforced, either at law or in equity. *Brown v. Wingard*, 300.
7. See CONSIDERATION, 7. *Law v. Hyer*, 349.
8. If a man contract to do a certain work at a certain price, and quit it before it is finished, he cannot recover upon *quantum meruit*, the value of his labor. *Lewis v. Esther*, 423.
9. See ASSUMPSIT, 5. *Porling v. Varnum*, 423.
10. See BILLS AND NOTES, 72. *Stone v. Mason*, 431.
11. See BARON AND FEME, 1. *Mechanics Bank v. Taylor*, 507.
12. If goods are shipped by a merchant in England to a mercantile house in this country, according to their order, they cannot refuse to receive them here, but by receiving them, are not bound to pay the invoice price. The plaintiff's can recover only as much as the goods were worth at the time and place of shipment, if the defendants object to the invoice price in a reasonable time. *Fenton v. Braden*, 550.
13. The Court may decree the specific execution of a contract to give collateral security. *Robinson v. Cathcart*, 590.
14. A clause in a contract, stating that, "in further confirmation of the said agreement, the parties bind themselves, each to the other, in the penal sum of \$1000," is not to be considered as liquidated damages for the breach of the agreement, but as a penalty superadded. *Ibid.*
15. If a written contract be not lost nor destroyed, but only "mis-laid," secondary evidence will not be admitted, although the party make oath that "he has searched for it among his papers repeatedly, and cannot find it." *Riggs v. Taylor*, 687.
16. If the contract be to purchase the defendant's bank stock at par, with so much of the next dividend as was then supposed to have been earned, estimated at three per cent., and it turns out that nothing was earned, there is an implied assumpsit on the part of the defendant, to refund the three per cent. And so much of the contract as relates to the advance of three per cent. is executory, even after the purchase money has been paid. *Ibid.*

CONTRIBUTION.

1. If one of three joint defendants pay the whole debt upon a joint execution for a

CONTRIBUTION, (*Continued.*)

- partnership debt, he cannot, at law, recover against the other partners their respective proportions of the whole debt which he has thus paid. *Riggs v. Stewart*, 171.
- The vessel and the cargo in the hold are not liable to contribution for the deck-load thrown overboard for the general safety. *Triplet and Neale v. Van Name et al.* 332.
 - A bequest of shares of stock in a bank, &c. with power to the executor to change the investment, is not a specific legacy, but is liable to contribution if the assets are not sufficient to pay all the pecuniary legacies. *Ladd v. Ladd*, 505.

COPYRIGHT.

- On the trial of an issue from chancery, to try the title to copyright, the bill and answer cannot be read to the jury unless it be so ordered by the court of chancery when the issue is ordered. *King v. Force*, 208.
- The omission to have the date of depositing the title of the map engraved thereon is fatal to the plaintiff's title. *Ibid.*

CORPORATION.

- See ACTION, 5. *Pritchard v. Corp. of Georgetown*, 191.
- An attachment under the Maryland Act of 1795, c. 56, against the property of a corporation aggregate will be dissolved by its appearance without bail. *Nicholl et al. v. Savannah Steamship Co.* 211.
- A corporation aggregate, whose president and treasurer reside in this district, cannot be compelled to give security for costs, as being non-resident plaintiffs. *Potomac Company v. Gilman*, 243.
- Quere*, whether the misnomer of a body corporate must be pleaded in abatement? *Central Bank v. Tayloe*, 427.
- The commissioners' book of subscriptions is *primâ facie* evidence that the subscriptions were genuine, or made by persons duly authorized; and the fact that the defendant was appointed by the stockholders one of the managers, and had acted as such, is *primâ facie* evidence of an admission on his part, of the existence of the corporation. *Rockville and Washington Turnpike Co. v. Van Ness*, 449.
- Directors *de facto* of a corporate body are to be considered *primâ facie* as directors *de jure*. It is not incumbent upon the plaintiff to prove that the managers were elected by a majority of the votes. *Ibid.*
- It is not competent for any stockholder to deny the existence of the corporation. *Ibid.*
- It is not competent for a real original subscriber to the company, who was one of the commissioners named in the act of incorporation for receiving subscriptions, and who acted as such, and was afterwards, at a meeting of the stockholders, elected as one of the managers, and acted as such, to object, in an action by the company against him for not paying the instalments called for, that a sufficient number of shares had not been subscribed to justify such election. *Ibid.*
- The Rockville & Washington T. P. Co. may maintain an action against a stockholder, for the amount of his subscription, and are not obliged to resort to a sale of his shares. *Rockville & Washington T. P. Co. v. Maxwell*, 451.
- The pamphlet of the laws of Maryland, published by the authority of the legislature of that State, and proved by a witness to be the book which is admitted as evidence of the laws of Maryland in the courts of Maryland, is admissible evidence of the act of incorporation of "the president, managers, and company of the Rockville and Washington Turnpike Road." *Rockville & Washington Turnpike Co. v. Andrews*, 451.

CORPORATION OF WASHINGTON.

- A writ of *mandamus* is the proper process to compel the Corporation of Washington, to pay to the county treasurer one half of the expense of erecting a bridge over Rock Creek, according to the 11th section of the Act of Congress of the 1st of July, 1812. *United States v. Corporation of Washington*, 174.
- The Levy Court is authorized by the act to ascertain conclusively the sum required for the rebuilding of the bridge. *Ibid.*
- See COLLECTOR, 1. *Corporation of Washington v. Walker*, 293.
- See BY-LAW, 10. *White v. Corporation of Washington*, 337.

CORPORATION OF WASHINGTON, (*Continued.*)

5. The election of a mayor of the city of Washington must be held in each ward by three commissioners of election. If the three are present, the acts of the majority are, in law, the acts of the three. The return by two is sufficient, if the three were present. The return of the commissioners is not conclusive, but is *prima facie* evidence that the votes were good, and throws the burden of proof on the relator to show that bad votes were given for the incumbent. If the election be held by two commissioners only, in any of the wards, the whole election is void. A certificate of the result of the election, must be returned by the commissioners to the boards of aldermen and common council. Parol evidence is competent to show that all the commissioners were present. *United States v. Carbery*, 358.
6. The Court cannot grant an injunction to prevent the execution of the Act of Congress of the 7th of May, 1822, authorizing the Corporation of Washington to drain the low grounds, &c. By that act the power to sell the lots is absolutely vested in the corporation, and the Court has only authority to decide what proportion, if any, of the money arising from the sale the complainants may be entitled to. The Court has no authority, under the act, to require the corporation to give security for the payment of a moiety of the proceeds of sale to the complainants. *Van Ness et ux. v. United States*, 376.
7. The Corporation of Washington, under the power given by their charter, to authorize the drawing of lotteries, sold to Gillespie, for \$10,000, a right to draw a certain lottery; *held*, that a person who bought a ticket of Gillespie, could not recover from the corporation the prize drawn against that ticket. *Clark v. Corporation of Washington*, 502.
8. Under the by-law of the Corporation of Washington of the 16th of August, 1809, a person who suffers and permits a faro-table to be set up and kept in his house, is liable to a separate prosecution for every day he shall so have suffered and permitted it to be so set up and kept. *Corporation of Washington v. Strother*, 542.
9. The holders of tickets in the Washington lottery, had no right to sue the managers upon the bond given by them to the Corporation of Washington, without the leave of the corporation; nor to sue the contractor for the lottery, on his bond given to the managers without their consent. *Corporation of Washington v. Young*, 632.
10. See BY-LAW, 15. *Botelov v. Corporation of Washington*, 676.
11. The clause in the charter of Washington which gives power to the corporation "to prescribe the terms and conditions upon which free negroes and mulattoes may reside in the city," is applicable only to those persons of color who come to reside in the city after the promulgation of such terms and conditions. *Billy Costin v. Corporation of Washington*, 254.

COSTS.

1. Costs are not given upon reversal in the Supreme Court of the United States. *Conway v. Alexander*, 57.
2. If a non-resident plaintiff who has been ruled to give security for costs, comes to reside with his family in the county of Washington, the rule will, on motion, be discharged. *Nicholls v. Johns*, 66.
3. *Assumpsit* will not lie, for the costs of appeal, against the person for whose use the appeal was prosecuted, and for whose use it was entered upon the record of the court of appeals; and a transcript of the record is not admissible evidence to support the action. *Williams v. Hopkins*, 98.
4. If the plaintiff reside out of the district, and the person for whose use the suit is entered upon the docket, remove from the district, the Court will, on motion, order the plaintiff to give security for costs. *Roberts v. Reintzel*, 235.
5. The amount of the costs of a suit in New York, may be proved by parol. *Woodward v. Hall*, 235.
6. See CORPORATION, 3. *Potomac Co. v. Gilman*, 243.
7. The Court will, on affidavit, reinstate a cause, *non-prossed* on a rule for security for costs laid on the plaintiff, who had no attorney in court; his attorney having died, and no rule served on the plaintiff to employ new counsel. *Cook v. Beall*, 264.
8. Costs do not accrue upon levying a distress for rent, unless the goods are sold. *Wright v. Waters*, 342.

COSTS, (*Continued*.)

9. Costs must share the fate of the principal debt. *Emerson v. Beale*, 349.
10. A debtor whose person is discharged under the insolvent act of the District of Columbia as to the debt, is not liable to a *ca. sa.* for costs, on a judgment confessed for costs after his discharge in an action pending at the time of his discharge. *Ibid.*
11. See **BILLS AND NOTES**, 65. *Ott v. Jones*, 351.
12. After the term in which a judgment has been entered and the costs taxed, the Court will not open the judgment to allow the cost of taking a deposition in New York. *Blugrove v. Ringgold*, 407.
13. The attendance of only three witnesses to any one fact will be allowed to be taxed against the opposite party, unless the Court shall be satisfied by affidavit that the party who summoned them had good reason to believe that their testimony would be necessary to support the issue or issues on his part. *Bussard v. Catalino*, 421.
14. Upon a petition for freedom, if the defendant will not give security that the petitioners shall be forthcoming at the trial, and if the marshal be ordered by the Court to take the petitioners into his possession for safe keeping until such security be given, and if judgment shall be against the defendant, the marshal's fees for keeping them shall be taxed in the bill of costs against the defendant. *Negro Rebecca v. Pumphrey*, 514.

COUNSELLOR AT LAW.

See **ATTORNEY AT LAW**, 2. *Law v. Ewell*, 144.

CRUELTY.

1. Public cruelty to a horse is an indictable offence. *United States v. Logan*, 259.
2. It is an indictable offence, cruelly, inhumanly, and maliciously to cut, slash, and beat one's own slave. *United States v. Robert Brockett*, 441.

DAMAGES.

1. The rule of damages, for not transferring stock according to contract, is the price of the stock on the day on which it ought to have been transferred. *Taylor v. Turner*, 203.
2. In cases of *tort*, courts have seldom granted new trials, on the ground of excessive damages, unless they were so excessive as to imply gross partiality or corruption on the part of the jury. *Swann v. Bowie*, 221.
3. The security which a judge, signing a citation on a writ of error which is to be a *supersedeas*, shall take, is to be for the costs and such damages as the Supreme Court may award for the delay. *Renner v. Bank of Columbia*, 310.
4. In mitigation of damages in an action of slander, the defendant may give evidence of the general reputation of the plaintiff's want of punctuality in payment of his debts. *Turner v. Forall*, 324.
5. See **CONTRACT**, 14. *Robinson v. Cathcart*, 590.

DEATH.

1. See **BILLS AND NOTES**, 45. *Bank of Washington v. Reynolds*, 289.
2. See **ADMINISTRATION**, 12. *Owen v. Blanchard*, 418.
3. The Court will not quash a *fi. fa.* issued after the death of the defendant, if it bear *teste* before his death. *Kane v. Love*, 429.
4. See **BANK OF WASHINGTON**, 1. *Brent v. Bank of Washington*, 517.
5. If the defendant die after office-judgment and writ of inquiry awarded, his administrator cannot plead *plene administravit* nor any other plea which the original defendant himself could not have pleaded. *Janney v. Mandeville*, 31.

DECLARATION.

1. See **BILLS AND NOTES**, 46. *Lapogre et al. v. Gales*, 291.
2. A judgment for the defendant in replevin, without a declaration, is irregular, and will, on motion, be set aside even at a subsequent term. *Ringgold v. Elliot*, 462.
3. In an action for maliciously holding to bail, the declaration must aver the want of probable cause, and for want of such an averment the judgment will be arrested. *Zandinger v. Wightman*, 478.
4. In trover, by husband and wife, for the conversion of the wife's goods before marriage, the declaration must conclude, *ad damna ipsorum*. *Semmes and Wife v. Shepley*, 534.
5. See **BILLS AND NOTES**, 95, 96. *Cogle v. Grazier*, 625.

DECLARATION, (*Continued.*)

6. A declaration, for a malicious arrest and holding to bail, must contain an averment that the suit in which the plaintiff was so maliciously held to bail, was determined. *Barrell v. Simonton*, 657.
7. A variance between the *capias ad respondendum* and the declaration is not a ground for arresting the judgment. *Wilson v. Berry*, 707.

DECREE NISI.

- A decree *nisi*, upon default of appearance and answer to a bill in chancery, does not become absolute until the end of "the term next succeeding that to which the decree shall be returned executed." *Stewart v. Smith*, 615.

DEED.

1. A deed of land in Maryland, acknowledged by the grantor before two justices of the peace of the county in Maryland, in which the grantor then resided, not being the county in which the land lay, is not properly recorded under the Act of 1766, c. 14, unless there were indorsed on the deed a certificate of the clerk of the county, under the seal of the Court, that the two justices were, at the time, justices of the peace of that county, and such certificate recorded with the deed. *Milligan v. Mayne*, 210.
2. See CONSIDERATION, 9. *Munro v. Robertson*, 262.

DEMAND.

- See CONTRACT, 3. *Somers v. Taylor*, 138.

DEMURRER.

1. The Court may, in its discretion, allow the general issue to be pleaded after judgment upon the demurrer has been awarded by the Supreme Court of the United States, and a mandate to this Court to enter the judgment, and award a writ of inquiry. *Sheehy v. Mandeville*, 15.
2. A count for injuring the plaintiff's mare by negligence, and a count upon a promise to return the mare safe, may be joined; and advantage can only be taken of the misjoinder, if it be one, by special demurrer. *Dobbin v. Foyles*, 65.
3. If the plaintiff demur to the defendant's plea to a chancery attachment, he thereby waives his right to move to strike out the plea, on the ground that it was pleaded without giving special bail. *Irwin v. Henderson*, 167.
4. A person for whose benefit an action is brought, but who does not appear to be a party upon the record, nor to be interested in the cause, cannot come in and in his own name, reply fraud and collusion between the legal plaintiff and defendant to defeat the action; and such a replication is bad upon demurrer. *Welch v. Mandeville*, 82.
5. Upon a prayer for instruction to the jury, the Court, in considering the question whether the jury can, from the evidence, infer the facts necessary to justify the instruction prayed, must decide in the same manner as they would upon a demurrer to evidence, and will consider all those facts as proved which the jury could legally infer from the evidence; but upon the question whether the instruction prayed be justified by the facts stated in the prayer, the Court is bound to decide upon those principles which ought to govern them in deciding upon a special verdict. The ultimate facts upon which the party relies, must be expressly and absolutely stated. The Court can infer nothing. *Bank of Alexandria v. Deneale*, 488.
6. If the plaintiffs are misnamed in the title of the cause in the margin of a plea of limitations, the plea is bad on special demurrer. *Bank of Columbia v. Jones*, 516.
7. The title of the cause written in the margin of a plea, is no part of the plea, but is only an intimation to the clerk in what cause he is to enter the plea; and a mistake in the name of one of the parties in the cause, made in the marginal title, is not fatal to the plea, even upon special demurrer. *Bank of Columbia v. Ott*, 529.
8. The defendant cannot take advantage of a variance between the writ and the declaration, without praying *oyer* of the writ. *Triplet v. Warfield*, 237.
9. Upon a demurrer to evidence the Court cannot render judgment for the plaintiff, if the declaration be substantially defective. *Bank of the United States v. Smith*, 319.
10. The Court will not compel a party to join in a demurrer to the evidence, unless

DEMURRER, (*Continued.*)

the other will admit all such facts as might be fairly inferred from the evidence. *Jordan v. Sawyer*, 373.

11. If evidence be given on both sides, and be complicated, the Court will not compel the plaintiff to join in demurrer to the evidence. *Stuart v. Columbian Ins. Co.* 442.

DEPOSITION.

1. The magistrate who, in taking a deposition under the Act of Congress, reduces to writing the testimony of the witness, need not state that it was done in the presence of the witness; but if reduced to writing by the witness himself, it must be done in the presence of the magistrate; and that fact may be proved *aliunde*. The authority of the magistrate need not be proved otherwise than by his own certificate. *Vasse v. Smith*, 31.
2. In taking a deposition under the Act of Congress, it is not necessary that the party or the magistrate should give notice to the adverse party or his attorney, if neither be within one hundred miles of the place of caption; nor that the magistrate should certify that he was not of counsel for either of the parties, nor interested in the event of the suit. *Miller v. Young*, 53.
3. When notice is given that a deposition will be taken between certain hours, it is not necessary to wait until the last hour. *House v. Cash*, 73.
4. It is not necessary that a magistrate who takes a deposition under the Act of Congress, should certify that he is not of counsel with either party. *Peyton v. Veitch*, 123.
5. If the magistrate who takes a deposition under the Act of Congress, omits to state whether notice was given to the defendants, it is competent for the other party to prove that the defendants lived more than one hundred miles from the place of caption, and had no agent or attorney within one hundred miles, &c. *Travers v. Bell et al.* 160.
6. The magistrate who takes a deposition under the Act of Congress, must certify that the deponent was "carefully examined, and cautioned and sworn or affirmed to testify the whole truth." *Garrett v. Woodward et al.* 190.
7. The magistrate who takes a deposition under the Act of Congress, need not certify that the deponent subscribed it in his presence, but the title of the cause in which it is to be used, must be truly stated in the certificate of the caption. *Centre v. Keene*, 198.
8. A deposition taken under the Act of Congress, must be reduced to writing by the magistrate, or by the deponent in his presence. *Edmondson v. Burrell*, 228.
9. If, at the trial, all objections are waived to a deposition, and a new trial be granted, the Court will not suffer objections to be made to the same deposition at the new trial. *Ibid.*
10. If a magistrate who takes a deposition under the Act of Congress, certifies that the deponent was carefully examined, and cautioned, and sworn to speak the whole truth, it is to be inferred that he was so examined, &c. by the magistrate. *Ibid.*
11. The magistrate, who takes a deposition under the Act of Congress, must certify the reasons of its being taken. *Woodward v. Hall*, 235.
12. In taking *ex parte* depositions under the Act of Congress, the requisites of the Act must be strictly pursued. *Thorpe v. Simmons*, 195.
13. If the name of one of the defendants be omitted in the caption of a deposition, it cannot be read in evidence in the cause. *Smith v. Coleman*, 237.
14. It is not necessary that the magistrate, who takes a deposition under the Act of Congress, should certify that the opposite party had no attorney within one hundred miles of the place of caption, in order to excuse the want of notice. *Ibid.*
15. It is no objection to a deposition, that the magistrate omitted to certify that he "cautioned" the witness. *Brown v. Platt*, 253.
16. It is no objection to a deposition, that in the caption it is not stated in which county of the District of Columbia the cause is depending; nor that the name of one of the parties is misspelled; nor that the magistrate has not certified that he reduced the testimony to writing in the presence of the witness; nor that the witness signed it in the presence of the magistrate. *Van Ness v. Huincke*, 259.
17. The mistake of the clerk in misnaming one of the parties in a commission to

DEPOSITION, (*Continued.*)

- take a deposition of a witness, may be amended by the order, in case of the death of the witness before the trial. *Boone v. Junney*, 312.
18. It is no valid objection to a deposition taken under the Act of Congress, that its envelope is not directed to "the Court," if it be directed "to the judges of the Court." *Thorp v. Orr*, 335.
19. It is sufficient evidence that the deposition was "sealed up" by the magistrate, if the envelope be sealed and the name of the magistrate written across the seal. *Ibid.*
20. Depositions taken in another suit for freedom by one of the same family, cannot be read in evidence as hearsay respecting the condition of their common ancestor. *Humphries v. Tench*, 337.
21. The Court will reject a deposition, if the notice was not reasonable. Notice given, at noon, to take a deposition between four and six o'clock of the same evening, is not reasonable, if there be no special circumstances to prevent an earlier notice. *Renner v. Howland*, 441.
22. In taking a deposition under the Act of Congress it is not necessary that the notice to the opposite party should require him "to put interrogatories if he should think fit," nor that the magistrate should certify that the witness was sworn to testify the whole truth "in the matter in controversy;" nor that the testimony, if reduced to writing by the witness, was so reduced to writing in the presence of the magistrate; nor will a deposition be rejected on account of the evidently accidental omission of a word in the magistrate's certificate of the caption. *Bussard v. Catalino*, 421.
23. The *ex parte* deposition of a deceased witness, not taken by consent, cannot be read in evidence. *Zautzinger v. Weightman*, 478.
24. When the issue is joined between the plaintiff and the garnishee in behalf of himself and his principal, the depositions must be entitled as of a suit between the plaintiff and the garnishee, and not between the plaintiff and the principal defendant. *Baker v. Mir*, 525.
25. A deposition, taken before the mayor of a city, who usually certifies his acts under his official seal, must be so certified; or his authority otherwise proved; which, it seems, may be done by parol. *Paul v. Lowry*, 628.
26. The certificate of a magistrate, who takes a deposition of a witness upon his affirmation in Pennsylvania, that the witness was conscientiously scrupulous of taking an oath, is sufficient evidence of that fact, to admit the deposition to be read in evidence. *Elliott v. Hayman*, 678.
27. If one only of three defendants be arrested, and a deposition be taken under the Act of Congress in a cause against the three defendants, the two not taken must be notified, if within one hundred miles of the place of caption. *Brown v. Piatt*, 253.

DEVASTAVIT.

1. See ADMINISTRATION. 3. *Gilpin v. Crandell*, 57.
2. *Id.* 11. *Young v. Manderville*, 444.
3. *Id.* 15. *United States v. Ricketts*; 553.

DISCONTINUANCE.

1. The Court will not reinstate a replevin which has been discontinued at a previous term. *Nicholls v. Hazel*, 95.
2. A replevin, discontinued by the non-appearance of the defendant at the first term, may be reinstated at the next, if the omission to enter the appearance were the error of the clerk. *Sherburne v. King, et al.* 205.
3. The Court will permit an action of replevin which has been discontinued at a former term by reason of the non-appearance of the defendant, to be reinstated and the continuances entered up, upon affidavit that the defendant's counsel, on a day during the term, directed the clerk to enter his appearance, and that the clerk neglected to make the entry on the docket. *McClod v. Gloyd*, 261.
4. The discontinuance of a cause under the Maryland Act of 1785, c. 80, for want of an appearance or proceedings for two terms after the suggestion of the death of a party, is cured by the subsequent appearance, trial, and verdict. *Brent v. Cople*, 287.
5. When an action of replevin has been discontinued by the non-appearance of either party, the Court will not, at a subsequent term, reinstate the cause, unless

DISCONTINUANCE, (*Continued.*)

it appear to be the fault of the clerk that the appearance was not entered. *Williamson v. Bryan*, 407; *French v. Venable*, 509.

6. If the writ be against two defendants, and one only be taken, the cause is discontinued unless an *alias capias* be issued against the defendant, not taken and continued by *pluries*, &c. until the trial term. *Nicholls v. Fearson*, 526.
7. In case of attachment by way of execution, if there be no appearance of the principal debtor or garnishee, or other proceeding at the return term of the writ, the attachment is discontinued. *Bank of Washington v. Brent*, 538.
8. If some of the terre-tenants named in the *scire facias* are returned "*nihil*," an *alias scire facias* must be issued against them, or the cause will be discontinued. *Baker v. French et al.* 539.
9. If the cause be *non-prossed*, and not reinstated at the same term, it cannot be reinstated at a subsequent term, but is discontinued. *Riggs v. Chester*, 637.

DISORDERLY HOUSE.

1. See BY-LAW, 4. *United States v. Robin Hood*, 133.
2. In a prosecution for keeping a disorderly house, the general character of the house is in issue, and may be given in evidence. *United States v. Henny Gray*, 675.
3. A house kept for the meeting of men and women for illegal and obscene purposes, or for the purpose of enticing young girls there for debauchery, is a disorderly house. *Ibid.*

DISTRESS.

1. A distress for rent, laid on the last day of the term, at noon, is too soon. *Johnson v. Owens*, 160.
2. Costs do not accrue upon levying a distress for rent, unless the goods are sold. *Wright v. Waters*, 342.
3. Distress for taxes due to the Corporation of Washington, is not barred by the statute of limitations. *Hogan v. Ingle*, 352.
4. Chairs left with a painter to be repaired, are not liable for his rent. *Mauro v. Boteler*, 372.
5. See CONSTABLE, 3. *United States v. Williams*, 438.
6. The bailiff of a landlord cannot lawfully force himself into a house by the outer door (although partially opened by one within) to make a distress for rent. *United States v. Stott*, 552.

DOG.

A constable is not justified under the by-law of Alexandria, in killing a dog, unless the jury expressly find that the dog was "found going at large within the limits of the corporation without his owner." *Swann v. Bowie*, 221.

DOWER.

1. If the widow renounce the provision made for her in the will, the remainder-man takes an immediate estate in the property devised, subject to the widow's dower. *Ladd v. Ladd*, 505.
2. The widow is not entitled to dower in lands of which her husband died possessed, but to which he had no legal title, although he had paid the whole purchase-money. *Williams v. Barrett*, 673.

DRUNKARD.

A prisoner should not be found guilty if, at the time of committing the act, he was in such a state of mental insanity, not produced by the immediate effects of intoxicating drink, as not to have been conscious of the moral turpitude of the act. *United States v. Michael Clarke*, 158.

DUTIES.

1. The United States have no specific lien on imported goods for the duties after having taken bond and security therefor, and delivered the goods to the consignee. *United States v. Murdoch et al.* 486.
2. The consignee is to be considered, under the 62d section of the Collection Act of 1799, as the owner. The consignor never was debtor to the United States for the duties. *Ibid.*
3. The United States may maintain *indebitatus assumpsit* for duties not bonded. *United States v. Howland*, 508.

EJECTMENT.

In ejectment, if the clerk, by mistake, omit to enter the tenant's appearance at the

EJECTMENT, (*Continued.*)

first term, and judgment be entered against the casual ejector, and a *habere facias* be issued, the Court will, at a subsequent term, upon affidavits, quash the *habere facias*, rescind the judgment, and permit the tenant to appear, upon entering into the common rule. *McCormick's Lessee v. Magruder*, 227.

ELECTION.

1. A stockholder of a bank, who has pledged his stock to the bank as collateral security for the payment of his notes, not yet due, has a right to vote as a stockholder at an election of directors. *Scholfield v. Union Bank of Alexandria*, 115.
2. A declaration for a libel charging the plaintiff with an attempt to put two votes into the ballot-box at a corporate election, must contain an averment of the by-law under which the election was held. *McClean v. Fowle*, 118.
3. The Columbian Insurance Company of Alexandria cannot, by a trustee, vote in an election of directors of the company, upon stock of the same company, purchased by the company, and held for their use in the name of the trustee. *United States v. Columbian Ins. Co. of Alexandria*, 266.
4. See CORPORATION OF WASHINGTON, 5. *United States v. Carbery*, 358.
5. In an action by the Rockville and Washington Turnpike Company it is not necessary for the plaintiff to prove that the managers were elected by a majority of votes. *Rockville and Washington Turnpike Co. v. Van Ness*, 449.
6. Judges of election are not liable to criminal prosecution, unless they acted from a corrupt motive. *United States v. Gillis et al.* 44.

EPISCOPAL CHURCH.

The vestry and wardens of "the Protestant Episcopal Church of Alexandria" were the vestry of the Protestant Episcopal Church in the parish of Fairfax, in the ecclesiastical meaning of those terms as modified by the laws and constitution of Virginia, and the canons of the Church. By the sale made under the decree in the case of *Taylor et al. v. Terret et al.* the purchasers became privies to the Church, and may avail themselves of the estoppel resulting from the warranty of Daniel Jennings, the original grantor. *Mason v. Muncaster*, 274.

EQUITY.

1. See BANK, 1. *Davis v. Beverly and Riggs*, 35.
2. See CONTRACT, 2. *Dunlop & Co. v. Hepburn et al.* 86.
3. In Alexandria, an execution *de bonis propriis*, is the proper process against an executor upon a decree in equity, for the balance of his administration account. *Cutlett v. Fairfax*, 99.
4. The Court will not, upon motion, quash the return of a *feri facias* levied upon an equity of redemption. *Warfield v. Wirt*, 102.
5. A plaintiff at law (in Alexandria, D. C.) after dissolution of an injunction, having taken out his execution and obtained satisfaction of his judgment at law, cannot, in an action upon the injunction-bond, recover the interest which accrued upon his judgment while he was delayed by the injunction. *Grundy v. Young*, 114.
6. A trustee appointed by a debtor to sell the mortgaged premises to the highest bidder, is bound to see that the sale is fairly made, and that there is a real competition. He is as much bound to take care of the interest of the debtor as of the creditor; and if he finds only sham competitors, he ought not to proceed with the sale at that time, but adjourn and give a new notice. If there were no competitors at the sale, and the creditor has bought the property at his own price, and recovered judgment at law for the balance of the debt, the Court will enjoin that judgment until the real value of the land bought in by the creditor, and the circumstances of the sale shall be ascertained upon final hearing. *Fairfax v. Hopkins*, 134.
7. The person who knowingly takes a dishonored check, payable to bearer, takes it subject to the drawer's equity against the person from whom he received it. If the holder at the time of his taking the check, knew that the person who gave it to him, had no right to give it, he cannot recover against the drawer. *Rounsavel v. Scholfield*, 139.
8. *Quare*, whether a Court of Equity can, or ought to decree the specific execution of a contract for the sale of personal goods in any case whatever? *Harper v. Dougherty et al.* 284.
9. This Court cannot grant an injunction to prevent the execution of the Act of

EQUITY, (*Continued.*)

- Congress of the 7th of May, 1822, for draining the low grounds in the city of Washington. *Van Ness v. The United States*, 376.
10. A cause in Equity, in this Court, may be reheard if the petition for rehearing be filed before the end of the next term after the final decree, and if no appeal lies to the Supreme Court in that cause. *Clarke v. Threlkeld*, 408.
 11. See BONDS, 3. *Smith v. Crease*, 481.
 12. A slave who has been manumitted and lost her deed of manumission may have relief in equity. *Negro Alice v. Morté et al.* 485.
 13. Unless some party defendants, against whom an effectual decree can be made, be found within the District of Columbia, the Circuit Court of that district, as a court of equity, has no jurisdiction of the cause. *Vasse v. Comegyss et al.* 564.
 14. Upon a motion to dissolve an injunction, an averment in an answer, not responsive to any allegation in the bill, it not, *per se*, evidence against the complainant. An answer of the defendant, in order to be evidence in his favor, must be an answer to a fact, and not an answer to a mere inference of law. *Robinson v. Cathcart*, 590.
 15. It is only between equal equities that the rule applies, *prior in tempore potior in jure*. *Ibid.*
 16. A voluntary conveyance is void as to subsequent purchasers for valuable consideration, even with notice. *Ibid.*
 17. When husband and wife are co-defendants, service upon the husband alone is good service of the *subpœna*. *Ibid.*
 18. An injunction till answer will not be dissolved until all the defendants who are interested have answered. *Ibid.*
 19. The Court may decree the specific execution of a contract to give collateral security. *Ibid.*
 20. The answer of one defendant is not evidence for another. *Ibid.*
 21. A motion to dissolve an injunction before final hearing is not, technically speaking, set for hearing on bill and answer. A cause is not set for hearing on bill and answer, until it is set for final hearing. *Ibid.*
 22. A mistake of the law is not a ground of relief in equity, where no fraud is charged. *Ibid.*
 23. If there are several defendants, the Court will not, in general, dissolve the injunction until all have answered. *Ibid.*
 24. In allowing claims upon a trust-fund, as between contending creditors, a claim upon a judgment of more than twelve years' standing, must be rejected without pleading the statute of limitations, as there was no time when the debtor or his administrator could plead it. *Farmers and Mechanics Bank, of Georgetown v. Melvin*, 614.
 25. The widow is not entitled to dower in lands to which her husband had only an equitable title. *Williams v. Barrett*, 673.
 26. He who takes a legal title, with notice of a prior equitable title, is trustee for him who holds the equitable title; but the legal title obtained by a purchaser under the former, although with notice of the prior equitable title, will not be disturbed if the purchaser was encouraged by the latter to pay the purchase-money. *Kurtz v. Bank of Columbia*, 701.
 27. If the plaintiff has a legal claim, he must pursue his remedy at law as far as he can before resorting to equity. *Coombe v. Meade et al.* 547.
 28. A purchaser under a power given by will to the executor to sell real estate for the payment of debts, is not bound to see that the purchase-money is properly distributed among the creditors of the testator. *Greenway v. Roberts*, 246.
 29. A decree *nisi*, upon default of appearance and answer to a bill in chancery, does not become absolute until the end of "the term next succeeding that to which the decree shall be returned executed." *Stewart v. Smith et al.* 615.

ERROR.

1. See AMENDMENT, 1, 2. *Marsteller v. Mc Clean*, 8.
2. In Virginia, a judgment on confession is equal to a release of errors, and the Court will not grant a writ of error *coram vobis*, upon suggestion of the death of the plaintiff, where the justice of the case does not require it. Nor will they quash a *fiery facias* issued in favor of the plaintiff's administrator, upon suggestion of the death of the administrator after the award of execution. *Cutlett v. Cooke*, 9.

ERROR, (*Continued.*)

3. The security which a judge signing a citation on a writ of error which is to be a *supersedeas*, shall take, is to be for the costs and such damages as the Supreme Court may award for the delay. *Remer v. Bank of Columbia*, 310.

ESTATE.

The word "estate," will apply to real or personal estate, or to both, according the manner in which it is used in reference to the respective clauses of the will. The following clause of the will did not charge the real estate: "I am security for my brother James, for two sums of money, for which I hold a deed of trust upon his property, sufficient, I hope, to pay the same; and I do direct that my estate shall not be sold to pay those debts, until the property so deeded shall be sold, when my estate must be charged for any deficiency." *Stump v. Deneale*, 640.

ESTOPPEL.

See EPISCOPAL CHURCH. *Mason v. Muncaster*, 274.

EVIDENCE.

1. The drawee of a forged draft is a competent witness to support the prosecution. *United States v. Bates*, 1.
2. The declarations of an ancestor, while held as a slave, cannot be given in evidence. Declarations of deceased persons that the ancestor was free, may be given in evidence to show that the ancestor was, in fact free; that is, not held in slavery. *Negro Priscilla Queen v. Neale*, 3.
3. A free-born negro is a competent witness in a case of freedom. *Mima Queen v. Hepburn*, 3.
4. The testimony of a subscribing witness cannot be dispensed with, although he resides in Massachusetts. *Whann v. Hall*, 4.
5. See BILLS AND NOTES, 2. 4. *Bank of Alexandria v. Wilson*, 5.
6. In assault and battery the plaintiff's counsel cannot ask his witness "who printed the handbill? and where was it printed?" because the questions were too general — not showing any agency of the defendant. *Snowden v. McGuire*, 6.
7. The indorsement by the plaintiffs and delivery of the note to a third person, so indorsed, is *prima facie* evidence that it was transferred for value received, and throws the burden of proof on the plaintiffs, to show that it has been retransferred, or was indorsed for collection, or that they had repaid the money. *Veitch & Co. v. Basye*, 6.
8. In a suit by the trustee of an insolvent debtor, a creditor of the insolvent is not a competent witness. *Herbert v. Finlay et al.* 12.
9. On a prosecution for keeping a bawdy-house, the United States cannot give evidence of the general reputation of the house. *United States v. Polly Rollinson*, 13.
10. The burden of proof of the want of consideration of a written promise is on the defendant. *Watson v. Dunlap*, 14.
11. Upon the issue of "no rent arrear," the plaintiff in replevin will not be permitted to show that the defendant had nothing in the tenements. In replevin for goods distrained for rent, the defendant cannot give evidence of the value of the use and occupation. *White v. Cross*, 17.
12. In slander, the defendant may, in mitigation of damages, give evidence of the grounds of his belief of the truth of the charge which he has made. *Cooke v. O'Brien*, 17.
13. If a colored man was born a slave, his being permitted to go at large without restraint, and to act as a free man, is no evidence of his being free. *Bell v. Hoqum*, 21.
14. If the plaintiff's freedom was not so notorious that the defendant might be presumed to know it, the defendant is not liable to damages for taking up the plaintiff as a runaway, he being a colored man, and, *prima facie*, a slave. *Ibid.*
15. A record of recovery of freedom by the female ancestor of the petitioner, on the ground of her having been born free, may be given in evidence to support the petitioner's title, although the present defendant was not a party to that record; and the depositions of deceased witnesses, contained in that record, may be read as hearsay to prove pedigree. A party producing a record in evidence is not obliged to read the whole of it, but the opposite party may read it. *Davis v. Forrest*, 23.

EVIDENCE. (*Continued.*)

16. Particular acts of turpitude cannot be given in evidence to discredit a witness — the question is only as to his general character for veracity. *Ibid.*
17. Upon the issue of *plene administravit*, a surety in the administration-bond is a competent witness for the defendant. *Fairfax v. Fairfax*, 25.
18. If the defendant offer evidence of the payment of the testator's bond, he need not prove its execution by the subscribing witnesses. *Ibid.*
19. Bills, purchased and remitted to pay a foreign debt, may be given in evidence as payments, if purchased and remitted before the writ was served on the defendant. *Ibid.*
20. The confession of a prisoner, taken upon oath, cannot be used against him upon his trial. *United States v. Bascadore*, 30.
21. See DEPOSITION, 1. *Vasse v. Smith*, 31.
22. In a joint action of trespass against two defendants, if they plead severally, they may mutually be examined as witnesses for each other. *Quære? Piles v. Plum & Swann*, 32.
23. In trespass, one defendant cannot be a witness for the other, in a joint action, although they plead severally. *Johnston v. Chapman et al.* 32.
24. Parol evidence cannot be given of a transfer in writing without proof of the loss of the writing, or otherwise accounting for its non-production. *Wilson v. Young*, 33.
25. A surety in a replevin-bond is not a competent witness for the plaintiff in replevin, although he has an indemnifying bond. *Thompson v. Carbery*, 35.
26. In a criminal case, parol evidence may be given to explain the intention with which a deed was made; and to prove that although it purported to convey a negro to the grantee, his executors, and administrators forever, the grantor intended to convey only his own title. *United States v. Thomas*, 36.
27. An indorser is a competent witness for the maker of a note to prove that the indorsement was without consideration, and to give credit to the note, but the payee is not a competent witness for the plaintiff. *Gilman v. King*, 48.
28. See BILLS AND NOTES, 12. *Bank of Alexandria v. Young*, 52.
29. See DEPOSITION, 2. *Miller v. Young*, 53.
30. See BARRATRY. *United States v. Porter*, 60.
31. The person defrauded is a competent witness for the prosecution upon an indictment for the fraud. *Ibid.*
32. A witness is incompetent who has been convicted of a conspiracy to defraud the creditors of an insolvent debtor. *Ibid.*
33. A grand juror may be required to testify as to the evidence given before the grand jury. *Ibid.*
34. Upon an indictment for taking usury, the borrower is a competent witness for the prosecution, if he has paid the money, and be not the informer. *United States v. Moxley*, 64.
35. See ADMINISTRATION, 4. *Thompson v. Afflick*, 67.
36. The contents of a warrant cannot be proved without producing it or accounting satisfactorily for its non-production. *United States v. Chenault*, 70.
37. The jury may presume payment of an instalment payable nineteen years and ten months before suit brought. *Miller v. Evans*, 72.
38. See DEPOSITION, 3. *House v. Cash*, 73.
39. Upon a motion to exonerate bail, the Court will not receive evidence of fraud in the principal in contracting the debt. *Burns v. Sim's Bail*, 75.
40. A slave is not a competent witness against a free black person in a capital case; but free blacks, unless they are in a state of servitude, by law, are competent witnesses against free blacks. *United States v. Minta Butler*, 75.
41. The contents of a written notice cannot be given in evidence unless notice has been given to the party to produce it. *Underwood v. Huddleston*, 76.
42. Confessions made under the influence of hope or fear cannot be given in evidence. *United States v. Negro Charles*, 76.
43. Grand jurors may testify as to the confessions made by the prisoner upon oath, when under examination as a witness against another person. Subsequent confessions, after having confessed under the influence of hope or fear, cannot be given in evidence. *Ibid.*
44. In an action of debt upon an inquisition taken under the charter of the Georgetown and Alexandria Turnpike Company, the defendant, upon *nil debet* may

EVIDENCE, (*Continued.*)

- give evidence of fraud or partiality, or irregularity on the part of the jurors who took the inquest, but the jurors themselves cannot be examined of each others' conduct. It is necessary, that all the jurors sworn, should agree in the inquest. *Custiss v. Georgetown & Alexandria Turnpike Co.* 81.
45. In an action by the indorsee against the indorser of a promissory note, the maker is a competent witness to prove the contract to be usurious, unless he is interested. *Knowles v. Parrott*, 93.
 46. A free-born mulatto is a competent witness against a white person. *United States v. Douglass*, 94.
 47. An informal instrument of manumission, accompanied by an actual manumission of the defendant before the commission of the offence charged, followed by a formal deed of manumission after the commission of the offence, is sufficient evidence that the defendant was not a slave at the time of committing the offence. *United States v. Negro Jacob Bruce*, 95.
 48. An account for work and labor cannot, at the trial, be given in evidence upon *non assumpsit*, as a set-off, unless the account has been filed and notice given. *Whetcroft v. Burford*, 96.
 49. New evidence cannot be given upon appeal from the Orphans' Court. *Gittings v. Burch*, 97.
 50. See COSTS, 3. *Williams v. Hopkins*, 98.
 51. The principal obligor having confessed judgment, and having been released by the defendant from the costs of this suit, is a competent witness for the defendant to prove the bond usurious. *Peirce v. Reintzel*, 101.
 52. A defendant in equity is a competent witness upon an indictment against the plaintiff in equity for perjury in his affidavit made to procure an injunction. *United States v. Burford*, 102.
 53. The declaration of the prisoner of his intention, as to any of the overt acts of treason charged in the indictment, may be given in evidence before evidence is offered of such overt acts. *United States v. Lee*, 104.
 54. When the subscribing witnesses to a bond reside in a foreign country, evidence of the handwriting of the obligor and subscribing witnesses will be left to the jury as *prima facie*, but not conclusive proof, upon the issue of *non est factum*. *Davies v. Davies*, 105.
 55. The Court will not, at the trial, compel the plaintiff to produce a charter-party, without previous notice, of which charter-party the defendant has a counter-part; nor permit the defendant to give it in evidence without proof by the subscribing witness. The captain's protest may be given in evidence to corroborate his testimony. *Sampson v. Johnson*, 107.
 56. *Quere*, whether a free colored man is a competent witness in a cause between white persons. *O'Neale v. Willis*, 108.
 57. A colored person who has been made free under the Maryland Act of 1796, c. 67, is not a competent witness against a white person. *United States v. Minifie*, 109.
 58. Upon an indictment for selling a free person as a slave, under the Maryland Law of 1796, c. 67, parol evidence may be given of the contents of papers delivered by the witness to the defendant, without a previous notice to produce them. *United States v. Carrico*, 110.
 59. Parol evidence cannot be given of the contents of a letter from the notary-public to the defendant, put into the post-office, without notice to the defendant to produce it. *Bank of Washington v. Kartz*, 110.
 60. In trespass, when the defence is on warrant, the plaintiff is not permitted to give evidence of trespasses committed at a place not located on the plats; nor outside of the plaintiff's lines as located by him on the plats; although by his title he had a right to locate them so as to include the place where, &c. The plaintiff is bound by his location and cannot claim land not included therein. The plaintiff cannot recover unless he was in possession of the land at the time of the alleged trespass. *Holmead v. Corcoran*, 119.
 61. The Court will not receive evidence of the declaration of jurors that they assessed the damages by taking the average of the sums put down by each juror respectively. *Ibid.*
 62. See DEPOSITION, 4. *Popton v. Vetch*, 123.
 63. The caption of the deposition must name all the parties in the suit. *Ibid.*
 64. See ADMINISTRATION, 3. *Craig v. Reintzel*, 128.

EVIDENCE, (*Continued.*)

65. A copy from the records, of a deed of personal property which derives no validity from being recorded, is not competent evidence. *Ormsby v. Tingey*, 128.
66. See BIGAMY, 1, 2, 3, 4. *United States v. Lambert*, 137.
67. See CONTRACT, 3. *Somers v. Tayloe*, 138.
68. Parol evidence may be given to show that the parties named in a written contract, were agents of other persons, who were the real contracting parties. *Ibid.*
69. Naturalization cannot be proved by parol. *Slade v. Minor*, 139.
70. In an action upon the statute of Virginia for carrying away the plaintiff's slave, evidence will not be permitted to prove that the slave had hired himself as a free man to another master of a vessel in a previous voyage. *Washington v. Wilson*, 153.
71. See ATTACHMENT, 4. *Ricketts v. Henderson*, 157.
72. See DEPOSITION, 5. *Traverse v. Bell*, 160.
73. In an action upon a replevin-bond, it seems that the defendant may, in mitigation of damages, give evidence that he was cheated at cards by the plaintiff, whereby the plaintiff won the defendant's mare, which was the subject of the replevin. *McDaniel v. Fish et al.* 160.
74. In an action against James and Robert, charging them as copartners upon bills drawn by James in his own name, but for the benefit of the partnership, James cannot be examined as a witness for Robert, upon an issue joined by Robert alone, although judgment should have been rendered against James by default. *Nicholson v. Patton*, 164.
75. See CHARTER-PARTY, 1. *Bowie et al. v. Wheelwright*, 167.
76. In a suit between contending mortgagees, the mortgagor is a competent witness, for the first mortgagee, to identify the goods described in the first mortgage. *Wagner v. Watts*, 166.
77. See DEPOSITION, 6. *Garrett v. Woodward et al.* 190.
78. A witness, who is interested, cannot be compelled to testify against his interest. *Pritchard v. Corporation of Georgetown*, 191.
79. See DEPOSITION, 12. *Thorpe v. Simmons*, 195.
80. See DEPOSITION, 7. *Centre v. Keene*, 198.
81. The making of a promissory note can only be proved by the subscribing witness, if there be one. Evidence of the confession of the maker that he owes part of it, is not sufficient on the money counts. *Turner v. Green et al.* 202.
82. See BILLS AND NOTES, 30. *Gaither v. Lee*, 205.
83. An old entry in a memorandum-book of a deceased person, stating the ages of the several members of his family, may be given in evidence to prove the age of a witness. *Negro Clara v. Ewell*, 208.
84. See COPYRIGHT, 1. *King v. Force*, 208.
85. See DEED, 1. *Milligan v. Mayne*, 210.
86. In executing a writ of inquiry in Alexandria, District of Columbia, the plaintiff's own affidavit may be read in evidence of the amount of damages. *Keene v. Cooper*, 215.
87. See AFFIDAVIT, 8. *Mills v. Wilson*, 216.
88. See BILLS AND NOTES, 33. *Mechanics Bank v. Taylor*, 217.
89. The lapse of nine years since the plaintiff arrived at the age of twenty-one years does not create a presumption that the oath was taken by the person who brought the plaintiff into Virginia. *Negro Reeler v. Robinson*, 220.
90. See DEPOSITION, 8, 9, 10. *Edmondson v. Barrell*, 228.
91. A baker's tallies may be produced in evidence, after calling upon the defendant to produce his counterpart. *Travers v. Appier*, 234.
92. See DEPOSITION, 11. *Woodward v. Hall*, 235.
93. The amount of the costs of a suit in New York may be proved by parol. *Ibid.*
94. Length of time does not raise a presumption against a slave that his owner took the oath required by law. *Negro Jack Garrettson v. Lingan*, 236.
95. See DEPOSITION, 13, 14. *Smith v. Coleman*, 237.
96. If the defendant call upon the plaintiff to produce a certain account at the trial, and when produced refuses to read it in evidence, the plaintiff cannot read it to the jury because called for by the defendant. *Ibid.*
97. The defendant in replevin who justifies under an execution directed to him as a constable, if indemnified by the plaintiff in the execution, having no other interest than the possibility of receiving commissions and fees upon an execu-

EVIDENCE, (*Continued.*)

- tion which may be issued again in the same cause, is a competent witness for the defendant. *Wise v. Bowen*, 239.
98. When an issue is sent from the Orphans' Court, to be tried at this Court, and is accompanied by the libel and answer, they may be read in evidence upon the trial of the issue. *Evans v. Evans*, 240.
99. A colored man, who has resided in this district eight years and publicly acted as a free man, and so generally reputed to be, is a competent witness for the United States against a free colored person. *United States v. Negro Jack Neale*, 241.
100. If a person, knowing the contents of a forged letter, and with intent to obtain money thereupon, deliver it, although sealed, to the clerk of the person to whom it is addressed, and whom he supposes to be authorized to open it, this is evidence of uttering it. *United States v. Carter*, 243.
101. See **BILLS AND NOTES**, 38. *Whittemore v. Herbert*, 245.
102. A witness in a criminal cause will be compelled to answer a question which he says upon his oath he cannot answer without disclosing a fact which may be material and important evidence to criminate himself as participator in the same offence for which the defendant stands indicted; provided that the Court should be of opinion that no direct answer to the question could furnish evidence against the witness. *United States v. Miller*, 247.
103. See **BILLS AND NOTES**, 39, 40, 41. *Bank of Washington v. Way*, 249.
104. See **BILLS AND NOTES**, 42. *Brown v. Piatt*, 253.
105. See **DEPOSITION**, 16. *Van Ness v. Heineke*, 259.
106. See **CONTINUANCE**, 1. *Bestor v. Sardo*, 260.
107. The answer to a bill in equity, so far as it is responsive to the allegations of the bill, is conclusive evidence unless contradicted by two witnesses. *Harper v. Dougherty*, 284.
108. See **BILLS AND NOTES**, 45. *Bank of Washington v. Reynolds*, 289.
109. It is not competent for the plaintiff to give evidence of the defendant's acknowledgment of the receipt of the goods mentioned in a certain account which had been delivered to the defendant without having first given notice to produce the account. *Nicholls v. Warfield*, 290.
110. See **CONFESSION**, 2. *United States v. Pocklington*, 293.
111. If forged papers be inclosed, and sealed up in a letter written in the State of Tennessee, and there directed to the Paymaster-General in Washington, and sent by the mail with intent to defraud the United States, and the letter be received and opened by the Paymaster-General in Washington, this is not an uttering and publishing of the said forged papers in the county of Washington. *United States v. Wright*, 296.
112. A witness is not bound to answer a question if it shall appear to the Court that the answer would have a probable tendency to criminate the witness. *United States v. Lynn*, 309.
113. The contents of a written paper cannot be proved by parol unless the paper be lost or destroyed. *Ibid.*
114. See **DEPOSITION**, 17. *Boone v. Janney*, 312.
115. One of two joint owners of a vessel is a competent witness to prove a joint claim against a passenger in the vessel for the passage-money, if the other joint owner has given him credit in account for his share of the passage-money, and a release of a claim to recover it back in case he should not get it from the passenger. *Massoletti v. Miller*, 313.
116. In a joint action upon a promissory note, if one of the defendants suffer judgment to go against him by default, and a writ of inquiry be executed, he is not a competent witness upon the issue joined by the other defendant. *Franklin Bank v. Hipkins et al.* 315.
117. An averment of a demise, from year to year for three years at \$120 a year, is not supported by evidence of a demise from year to year for two years at \$120 a year, and for one year at \$100 a year. *Dorsey v. Chenault*, 316.
118. See **DEMURRER**, 9. *Bank of the United States v. Smith*, 319.
119. See **DAMAGES**, 4. *Turner v. Foxall*, 324.
120. See **BILLS AND NOTES**, 61. *Gassaway v. Jones*, 334.
121. See **DEPOSITION**, 18, 19. *Thorp v. Orr*, 335.
122. Before secondary evidence of a written instrument can be given, the Court must be satisfied by the affidavit of the party offering it, or otherwise, that the sup-

EVIDENCE, (*Continued.*)

- posed original paper did once exist, and that it is not in his power to produce it. *Maye v. Carbery*, 386.
123. See DEPOSITION, 20. *Humphries v. Tench*, 337.
124. A copy of a regimental paymaster's account, as settled by the accounting officers of the Treasury, certified according to the Act of March 3, 1817, is competent evidence, to the jury, of the balance due from the paymaster to the United States. *United States v. Van Zandt*, 338.
125. A copy of a paymaster's bond certified according to the "act to provide more effectually for the settlement of accounts between the United States and receivers of public money," is competent evidence. *Ibid.*
126. The plaintiff cannot be nonsuited for not producing books and papers upon a mere notice by the defendant to produce them at the trial. There must be a motion to the Court for an order to produce them; and notice of such a motion; and an order of the Court; and if the motion be not made until the cause be called for trial, at the last calling of the docket, the Court will continue the cause until the next term. *Bank of the United States v. Kurtz*, 342.
127. A person relying upon the proviso in the Virginia law in favor of persons coming to reside in Virginia and bringing their slaves with them and taking a certain oath, must produce competent testimony to prove that the terms and provisions of the proviso had been complied with; and in the absence of all testimony no presumption can arise from the lapse of time, to supply the defect of such testimony. *Negro Matilda v. Mason et al.* 343.
128. The statute-book of one of the States, purporting to be published by authority of its legislature, and deposited in the Department of State of the United States, under an act of Congress requiring the Secretary of State to obtain copies of the laws, is admissible evidence of the laws of such State in the courts of the District of Columbia; and it is not necessary that such statute-book should be authenticated according to the provisions of the Act of Congress of the 26th of May, 1790. *Commercial and Farmers Bank of Baltimore v. Patterson*, 364.
129. According to the laws of Pennsylvania, the equity follows a promissory note into the hands of an indorsee unless dated at Philadelphia, and made payable "without defalcation." The words, "without defalcation" do not prevent the maker of a Pennsylvania note from showing fraud in the payee in obtaining the note. *Ibid.*
130. See BILLS AND NOTES, 62, 63, 64. *Ibid.*
131. See BILLS AND NOTES, 65. *Ott v. Jones*, 351.
132. In the election of a mayor of Washington, the return of the commissioners is not conclusive, but *prima facie* evidence that the votes were good. Parol evidence is competent to show that all the commissioners were present. *United States v. Carbery*, 358.
133. An insolvent debtor is bound to produce and surrender all his evidences of debt. *Ex parte Henry Hadry*, 364.
134. If an agreement in writing be made by one of the partners of a mercantile firm, it is competent for the plaintiffs, in an action in the name of the members of the firm, to prove by parol that it was made by that partner as the agent, and for the use and benefit of the firm. *Hutchinson et al. v. Peyton et al.* 365.
135. The fact that insurance was made cannot be proved without producing the policy, or showing it to be lost. *Ibid.*
136. A contractor's account, adjusted by the proper accounting officers of the Treasury, and certified and authenticated according to the 11th section of the Act of the 3d of March, 1817, c. 45, is evidence, not only of money advanced to the contractor, but of money disbursed by officers of the army for provisions in consequence of the contractor's failure to comply with his contract. *United States v. Griffith*, 366.
137. The third auditor is not authorized to authenticate copies of bonds and other papers. His power under the Act of the 3d of March, 1817, extends only to "transcripts from the books and proceedings of the Treasury in regard to the accounts of the War Department." Copies of bonds must still be certified by the register, and authenticated under the seal of the department, under the Act of the 3d of March, 1797. *Ibid.*
138. The person intended to be injured by a forgery, and the person whose name is

EVIDENCE, (*Continued.*)

- forged, are competent witnesses to prove the forgery. But if the witness has paid money upon the forged paper he is not competent to prove the forgery. *United States v. Crandell*, 373.
139. The Court will not compel a party to join in a demurrer to the evidence, unless the other party will admit all such facts as may be fairly inferred from the evidence. *Negro Wm. Jordan v. Sawyer*, 373.
140. See ARBITRATION, 3, 4, 5. *Goldsborough v. McWilliams*, 401.
141. A person who has given a receipt for goods to be delivered to another person is a competent witness for the United States upon a prosecution against another person for stealing the goods. *United States v. Bates*, 405.
142. See BILLS AND NOTES, 70. *Farmers Bank v. Lloyd*, 411.
143. Although a confession, made under a promise of favor, is not, of itself, evidence against a prisoner; yet the fact of the prisoner's going to the place where the property was secreted and identifying it, is evidence against him. *United States v. Negro Richard*, 439.
144. See DEPOSITION, 21. *Renner v. Howland*, 441.
145. If evidence be given on both sides, and be complicated, the Court will not compel the plaintiff to join in demurrer; nor will they undertake to say what facts the party offering to demur, ought to admit as inferences from the evidence; nor will they compel the other party to join in the demurrer upon his offering to admit all the inferences which the Court should say the jury could reasonably infer from the evidence. *Stuart v. Col. Insurance Co.* 442.
146. Unless notice of set-off be given before the suit is called for trial, it will not be permitted to be given in evidence upon *non assumpsit*. *Deneale v. Young*, 418.
147. See DEPOSITION, 22. *Bussard v. Catalino*, 421.
148. See ADMINISTRATION, 4. *Burch v. Spaulding*, 422.
149. A witness will be permitted to refresh his memory, as to the items of an account for work and labor, by the original entries only, made by himself, or by another in his presence; and although he has no distinct recollection of each particular item charged, yet if he has a distinct recollection of such work as is charged in the account generally, being done, and, after having refreshed his memory, if he can swear that the work was done as charged in such account, his testimony will be competent evidence. *Jones v. Johns*, 426.
150. See BOOKS AND PAPERS, 2. *Central Bank v. Tayloe*, 427.
151. When the assignment of the time of service of a servant is in writing, parol evidence of a promise, that the servant had a certain time to serve, cannot be admitted. *Smallwood v. Worthington*, 431.
152. See CORPORATION, 5. *Rockville and Washington Turnpike Co. v. Van Ness*, 449.
153. See CORPORATION, 10. *Rockville and Washington Turnpike Co. v. Andrews*, 451.
154. Terms offered by way of compromise cannot be given in evidence to rebut the statute of limitations. *Ash v. Hayman*, 452.
155. See BILLS AND NOTES, 76. *Knowles v. Stewart*, 457.
156. See AGENT, 7. *Davis v. Robb*, 458.
157. In an action against a surety in a prison-bonds bond, the defendant will not be permitted to produce evidence that the principal (the debtor) was insolvent, and therefore the plaintiff sustained no damage. *Smoot v. Lee*, 459.
158. See ATTORNEY, 6. *Crittenden v. Strother*, 464.
159. In an action by the indorsee against the maker of a promissory-note, the indorser is a competent witness for the plaintiff, (without a release,) to prove the acknowledgment of the debt so as to take the case out of the statute of limitations. *Bank of Alexandria v. Clarke*, 464.
160. The owner of the goods stolen after having released to the United States and to the prisoner, all his interest in the fine, is a competent witness for the United States, and may be examined generally. *United States v. Carnot*, 469.
161. The Court will not permit evidence to be given of the private opinion of the witness as to the fraud or fairness of the plaintiff's conduct, derived from facts which appeared before the witness as an arbitrator. *Zantzinger v. Weightman*, 478.
162. The *ex parte* deposition of a deceased witness, not taken by consent, cannot be read in evidence. *Ibid.*
163. A claim which has been pleaded, or offered in evidence as a set-off, and rejected by the verdict of the jury, will not maintain an action. *Janney v. Smith*, 499.

EVIDENCE, (*Continued.*)

164. Upon the trial of an indictment for offering a bribe to a witness, the previous declarations of the defendant as to his motives for offering it, cannot be given in evidence by the defendant. *United States v. Milburn*, 501.
165. A witness before the grand jury is bound to answer a question, although he make oath that he cannot answer it without criminating himself. *Devaughn's case*, 501.
166. The collector's books, in the handwriting of a deceased clerk, are evidence for the United States. *United States v. Howland*, 508.
167. The books of a bank which do not show whether the checks drawn upon it were payable to bearer or to order, nor the names of the persons in whose favor they were drawn, are not evidence of money paid to any particular person. *Boyd v. Wilson*, 525.
168. If three persons be jointly indicted for a riot, and one only be put upon his trial, the other two, having forfeited their recognizances, cannot be examined as witnesses for the defendant. *United States v. Rutherford*, 528.
169. When evidence is offered of what a deceased witness testified at a former trial of the same cause, that evidence must be of the very words of the deceased witness. *Bennett v. Adams*, 551.
170. If the clerk who made the original entries in the testator's books, be made executor, those entries are competent evidence in an action by the executor for goods sold and delivered by the testator to the defendant. *Hodge v. Higgs*, 552.
171. In an action by the indorsee of a promissory note against the maker, upon the plea of limitations, evidence that the note within the last three years before the commencement of the suit, was presented to the defendant, who acknowledged it to be his note, and that it had not been paid, and said that the note had been of long standing, and that he should resist payment, but offered terms of compromise which were not accepted, is evidence of such an acknowledgment of the debt as takes it out of the statute. *Rhodes v. Hadfield*, 566.
172. Upon the trial of an issue upon allegations under the insolvent act, the burden of proof is on the complaining creditors to show the fraudulent intent. *Ex parte Henry Knowles*, 576.
173. The authority of a justice of the peace, in one of the States, may be proved by parol. *Winter v. Simonton*, 585.
174. See AFFIDAVIT, 12. *Ibid.*
175. See ANSWER, 2, 3. *Robinson v. Cathcart*, 590.
176. The bill of lading is not conclusive evidence of an express agreement as to the price of freight. *Sinmes v. Marine Ins. Co. of Alexandria*, 618.
177. The bond of conveyance of the vessel by the builder to the plaintiff, was not conclusive evidence that the ownership, so far as the freight was concerned, was in the builder at the time of the insurance. *Ibid.*
178. See BILLS AND NOTES, 95, 96, 97. *Coyle v. Gozzler*, 625.
179. If the notary-public has no memorandum nor recollection of the day of demand and notice, but has a memorandum in his book that demand was made and notice given to the indorsers, and testifies that it was his universal practice to make the demand and give notice on the day after the last day of grace, such testimony is competent evidence for the consideration of the jury. *Ibid.*
180. See BILLS AND NOTES, 98. *Patriotic Bank v. Little*, 627.
181. See DEPOSITION, 25. *Paul v. Lowry*, 628.
182. The declaration of the notary's deputy cannot be given in evidence. *Bank of Columbia v. Mackall*, 631.
183. The indorser may waive the objection of want of notice, after the laches has occurred. *Ibid.*
184. No paper can be read in evidence to the jury, without the leave of the Court. *Melvin v. Sackland*, 636.
185. Parol evidence is not competent to vary a written agreement. A written contract by one of two joint partners, made in his own name, does not bind the other partner, although the money obtained thereby be brought into the joint concern. The Court will not sign a bill of exceptions to the terms in which a certain paper, which had been offered in evidence, is described in the instruction of the Court to the jury, (the paper itself being referred to,) but will sign a bill of exceptions to the refusal of the Court to sign the former bill of exceptions. A written contract, the terms of which are clear and unambiguous, is

EVIDENCE, (*Continued.*)

- conclusive; and parol evidence is not admissible to contradict it. *Smith v. Hoffman et al.* 651.
186. See DISORDERLY HOUSE, 2. *United States v. Henry Gray*, 675.
187. See DEPOSITION, 26. *Elliot v. Hayman*, 678.
188. If two be indicted jointly for assault and battery, the wife of one of them cannot be a witness for the other, although they sever in their pleas. *United States v. Wade and Young*, 680.
189. A bookkeeper who has given a credit to A instead of B, by mistake, is a competent witness to prove the mistake without a release. Only what a witness recollects is competent evidence. *Patriotic Bank v. Frye*, 684.
190. The authority to indorse notes, need not be under seal. The existence of the original note, indorsed by the principal, may be proved by parol, without producing it; it having been cancelled and given up to the maker. *Bank of Washington v. Peirson*, 685.
191. See CONTRACT, 15, 16. *Riggs v. Tayloe*, 687.
192. Upon a second trial, the Court will not permit improper evidence, if objected to, to be given, although it had been received at the first trial without objection. *Ibid.*
193. Testimony of conversations, preliminary to a written, unconditional contract, is admissible and competent, on a count upon a written, conditional contract which is lost, destroyed, or mislaid, although the witness does not recollect the terms of the written contract, nor how it was expressed, but states his impression and belief. *Ibid.*
194. A copy of a deed of lands from the record-book may be read in evidence, without producing the original, or accounting for its non-production. *Peltz v. Clarke*, 703.
195. The entries of the division and allotment of the property of the original proprietors of the lands in the city of Washington may be given in evidence without producing, or accounting for the non-production of, the original certificate of division and allotment from which the entries were made. *Ibid.*

EXECUTION.

1. A *scire facias* to revive a judgment, is not a new action; and if the original judgment was rendered in Maryland, before the 27th of February, 1801, an execution, after the revival of the judgment by *scire facias* in Maryland, may be issued upon it by the clerk of this Court, under the act of Congress of that date, § 13, upon the filing of an exemplification of the record; but the exemplification must be of the whole record in the suit; not of the proceeding upon the *scire facias* only. *Fitzhugh v. Blake*, 37.
2. When the judgment is for a penalty to be released on the payment of a smaller sum, that sum must be ascertained before the execution can be issued. *Ibid.*
3. See EQUITY, 3. *Catlett v. Fairfax*, 99.
4. See BANK OF COLUMBIA, 1. *Okeley v. Boyd*, 176.
5. See CONSTABLE, 1. *United States v. Bill*, 202.
6. The Court, at a subsequent term, will set aside a judgment irregularly obtained, and quash the execution issued thereon. *Union Bank of Georgetown v. Crittenden*, 238.
7. If the plaintiff delivers his *fieri facias* to the marshal, and dies, and the marshal levies it upon the goods of the defendant, he has a right, under the laws of Virginia, to give a forthcoming bond to the deceased creditor; and such bond will support a judgment on motion by the administrator of the creditor. *Entwisle v. Bussard*, 331.
8. A motion for a new trial, or in arrest of judgment, is a waiver of the benefit of a stay of execution agreed upon by the parties. *Brent v. Coyle*, 348.
9. The Court has no jurisdiction to quash a *fieri facias* issued by order of a justice of the peace, from the office of the clerk of this Court, under the Act of Congress of May 3, 1802, § 4, and of the 24th of June, 1812, § 15: nor to render judgment of condemnation of the rights and credits returned upon such *fieri facias* as levied upon by the constable in the hands of a third person. The law has provided no means to compel the garnishee to pay the money in his hands. *Goulding v. Fenwick*, 350.
10. The lien upon the personal property of the debtor, created by the delivery of the *fieri facias* to the marshal, is lost by the return of *nulla bona*; and is not

EXECUTION, (*Continued*.)

- revived by the delivery of an *alias fieri facias* to the marshal, so as to overreach an intermediate sale by the debtor. *Maul v. Scott*, 367.
11. The Court will not quash a *fieri facias* issued after the death of the defendant, if it bear *teste* before his death. *Kane v. Love*, 429.
 12. If the plaintiff has countermanded his execution at the request of the defendant to give him time, or if he has been delayed by injunction obtained by the defendant, he may take out a new execution after the expiration of the year and day. *Muncaster v. Mason*, 521.
 13. If a debtor be taken on a *ca. sa.* in the District of Columbia, and give a prison-bounds bond, upon which also judgment is rendered against him, he may be retaken on the original *ca. sa.* after the expiration of a year after the date of the bond, and committed to close custody in execution. *Owen et al. v. Glover*, 522.
 14. See BANK OF COLUMBIA, 2, 3. *Bank of Columbia v. Bunnell*, 306.
 15. See ATTACHMENT, 23. *Bank of Washington v. Brent*, 538.
 16. The English statute of West. 2—13 Ed. 1, c. 45, which gives a *scire facias* to revive judgments in personal actions, is still in force in Virginia for that purpose. The Act of Virginia of the 19th of December, 1792, § 5, limiting the time of issuing writs of *scire facias* in certain cases, is an act of limitations, and must be pleaded. The defendant cannot avail himself of it by plea of *nul tiel record*, nor by motion to quash the *scire facias*, nor by motion in arrest of judgment. It does not apply to a case where an execution has issued and been returned. *Offutt v. Henderson*, 553.
 17. See BANK OF COLUMBIA, 4, 5, 6. *Bank of Columbia v. Cook*, 574.
 18. A *scire facias* is not necessary to revive a judgment, if a *fieri facias* has been issued and returned. But if executions are taken out to lie in the office, they must be renewed every year. *Johnson v. Glover et al.* 678.
 19. See BANK OF COLUMBIA, 7. *Bank of Columbia v. Sweeney*, 704.

EXECUTORS.

1. See EVIDENCE, 17, 18, 19. *Fairfax v. Fairfax*, 25.
2. The executor, upon *plene administravit*, is not to be charged with lands devised to him to be sold if necessary to pay debts. *Curran v. Munn*, 51.
3. See EQUITY, 3. *Catlett v. Fairfax*, 99.
4. The possession of property by the defendant under a disposition of it by deed, in the lifetime of the deceased, is not such a possession as will, in law, constitute the possessor executor *de son tort*. *Peters v. Breckenridge*, 518.
5. If the issue of "never executor" be found against the defendant, the judgment will be *de bonis testatoris si, &c., et si non, de bonis propriis*. *Ibid*.
6. An executor, indebted to his testator's estate, cannot in an action upon his administration bond, brought by creditors or legatees, discharge himself by showing payment to his co-executor. *United States v. Rose*, 567.
7. The creditors of the insolvent estate of a deceased debtor, have a right to contest the settlement of the executor's account before the Orphans' Court, and to appeal from its decision to this Court. *Nicholls et al. v. Hodge's Executor*, 582.

EXTORTION.

Laboring to exact fees from one party after having received them from another, is not extortion; and whether it be an indictable offence, *quere?* *United States v. Chenault*, 70.

FACTOR.

1. A factor may retain for a general balance due by his principal. *McCobb v. Lindsay & Hill*, 215.
2. If a factor sell in his own name, the vendee cannot set off a claim against the factor's principal, not yet payable. *Ibid*.

FALSE PRETENCES.

It is not an indictable offence at common law, to obtain and take, by means of false and fraudulent pretences, from the counting-house of a merchant, sundry of his books of account. *United States v. Carico*, 446.

FARO-TABLE.

1. See BY-LAW, 2. *United States v. Walls*, 45.
2. See CORPORATION OF WASHINGTON, 8. *Corporation of Washington v. Strother*, 542.
3. See BY-LAW, 4. *United States v. Robin Hood*, 133.

FEES.

1. See **ATTORNEY AT LAW**, 2. *Law v. Ewell*, 144.
2. If the verdict of the jury be below the jurisdiction of the Court, the jury is not entitled to the fee of twelve shillings. *Skinner v. McClaffrey*, 193.
3. See **ATTACHMENT**, 7. *Lee v. Patterson*, 199.

FERRIES.

1. This Court, sitting in Alexandria, has only the powers of a county court in Virginia, in relation to ferries. *Thomas Berry's case*, 13.
2. This Court has a discretion to grant or refuse a license for a ferry over the eastern branch. *Nicholas Young's case*, 453.

FINES AND PENALTIES.

1. The Levy Court of Washington county, District of Columbia, are only entitled to a moiety of the fixed fines, penalties, and forfeitures, accruing under the adopted statutes of Maryland; not of the common-law discretionary fines, nor of those imposed under original Acts of Congress. *Levy Court v. Ringgold*, 659.
2. The Attorney of the United States for the District of Columbia, is not bound, by the second section of the Maryland Act of 1795, c. 74, to order writs of *ca. sa.* for fines, &c., on the application of the marshal, nor can the marshal order them without the authority of the District Attorney, who has a discretion in that respect, which the marshal has no right to control. *Ibid.*
3. The marshal is not liable for fines which he has no means of collecting. *Ibid.*

FORESTALLING.

See **BY-LAW**, 15. *Botelov v. Corp. of Washington*, 676.

FORFEITURE.

Upon the seizure and condemnation of a vessel, for violation of the Act of February 28, 1806, to suspend commercial intercourse, &c., the United States are interested only in one half of the forfeiture. *United States v. Yeaton*, 73.

FORGERY.

1. The drawee of a forged draft is a competent witness to support the prosecution. *United States v. Bates*, 1.
2. Peremptory challenge not allowed. *United States v. Smithers*, 38.
3. Forgery of the note of a private unchartered bank may be punished, under the Maryland Act of 1799, ch. 75, § 1. *United States v. Winslow*, 47.
4. Possession of forged bank-notes with intent to utter them as true, is not an indictable offence. *United States v. Wright*, 68.
5. A note of an unincorporated bank, "payable out of the joint funds thereof and no other," is a promissory note within the meaning of the Maryland Statute, 1799, ch. 75, § 1. The note must be precisely and accurately set forth in the indictment. *United States v. Smith*, 111.
6. A defendant, indicted for counterfeiting a bank-note, in Alexandria, District of Columbia, is entitled to a peremptory challenge. *United States v. Wood*, 164.
7. Falsely altering a promissory note, in a material part, with intent to defraud any person, is a forging within the meaning of the statutes. *Ibid.*
8. See **EVIDENCE**, 99. *United States v. Carter*, 243.
9. An acquittal, upon an indictment for forging an order with intent to defraud John Lang, is no bar to an indictment for forging the same order with intent to defraud William Lang. *United States v. Book*, 294.
10. An order in these words; "Sir, Let the bearer have one pair of boots; yours, &c., Levin Stewart," is a draft for the delivery of goods, within the Maryland Act, 1799, c. 75, § 2. *Ibid.*
11. See **EVIDENCE**, 110. *United States v. Wright*, 296.
12. See **EVIDENCE**, 136. *United States v. Crandell*, 373.
13. A written request to lend money, may be the subject of forgery at common law. *United States v. Green*, 520.

FRAUD.

1. A sale of goods in the possession of the vendor's bailee, is fraudulent as to creditors unless the possession accompany and follow the sale; or an order be given by the vendor and served on the bailee, to deliver possession to the vendee. *Gibnan v. Herbert*, 58.
2. See **EVIDENCE**, 31, 32, 33. *United States v. Porter*, 60.

FRAUD. (*Continued.*)

3. Upon a motion to exonerate the bail, the Court will not receive evidence of fraud in the principal in contracting the debt. *Burns v. Sim's Bail*, 75.
4. The taking possession of, and cultivating the land, by the vendee, takes the sale out of the statute of frauds. *Conway v. Sherron*, 80.
5. A contract for the sale of the notes of a private bank, is within the statute of frauds. A verbal agreement, which is to be put into writing and signed the next day, is not complete so as to bind either party until reduced to writing and signed. *Reigs v. Magruder*, 143.
6. See BILL OF SALE, 1. *Washington v. Wilson*, 153.
7. A verbal acceptance of an order, drawn at the foot of the account of a third person against the drawer, is not a promise to pay the debt of another, within the statute of frauds. *Shields v. Middleton*, 205.
8. An auctioneer's memorandum, or entry in his sales-book, of a sale of lands, is not sufficient to take the case out of the statute of frauds, if it does not sufficiently describe the lands and the terms of sale. *Williams v. Threlkeld*, 307.
9. *Quære*, whether the auctioneer's written memorandum of the sale of lands is, in any case, sufficient to take the case out of the statute? *Ibid.*
10. A separate and express promise by one copartner, to pay a debt of the firm, is not a promise to pay the debt of another, within the statute of frauds, although judgment for the same debt had been recovered against the other partner. *Rice v. Barry*, 447.
11. If an insolvent debtor, upon allegations filed, be found guilty of having disposed of his property to defraud his creditors, he will be ordered into close custody and precluded from any benefit under the insolvent act. *Donoghue's case*, 466.
12. See BARON AND FEME, 1. *Mechanics Bank v. Taylor*, 507.
13. Upon the trial of an issue, upon allegations of fraud against an insolvent debtor, it must appear that the intended fraud was against creditors who were such at the time of the supposed fraudulent conveyance, and at the time of trial. *Ex parte Henry Knowles*, 576.
14. Upon the dissolution of a mercantile firm, if it be agreed that the acting partner shall take all the effects and pay all the debts of the firm, and this be known to the creditor of the firm, he cannot, with a good conscience, take a lien on the joint effects for new advances made by him to the acting partner on his own individual account, so as to exhaust the joint effects and leave the retiring partner liable for the old joint debt. *McClean v. Miller*, 620.

FREEDOM.

1. Upon a petition for freedom, the defendant may appear and disclaim without entering into the usual recognizance. *Negro Walter Thomas v. Scott*, 2.
2. See EVIDENCE, 2. *Queen v. Neale*, 3.
3. See EVIDENCE, 3. *Queen v. Hepburn*, 3.
4. If a colored man was born a slave, his being permitted to go at large without restraint, and to act as a freeman, is no evidence of his being free. *Bell v. Hogan*, 21.
5. If the plaintiff's freedom was not so notorious that the defendant might be presumed to know it, the defendant is not liable to damages for taking up the plaintiff as a runaway, he being a colored man and *prima facie* a slave. *Ibid.*
6. See EVIDENCE, 15. *Davis v. Forrest*, 23.
7. See EVIDENCE, 26. *United States v. Thomas*, 36.
8. See EVIDENCE, 47. *United States v. Bruce*, 95.
9. The time of a slave's sailing in a voyage from Alexandria is not to be considered as a part of his year's residence, so as to entitle him to freedom under the Virginia law of December 17, 1792, § 2. *Negro Robert Simmons v. Gird*, 100.
10. If a slave escape from his master in Virginia, and be found in Washington, District of Columbia, and there sold by his master, the slave does not thereby acquire a right to freedom. *Negro Emanuel v. Ball*, 101.
11. A slave does not acquire a right to freedom by being sent from Washington to Virginia for sale, and, not being sold, brought back after eight or nine months' absence. *Negro Violette v. Ball*, 102.
12. If a testator, by his will, manumits his slaves after a certain term of service, and the widow renounces the provision made for her by the will and adheres to her rights under the laws of Maryland, and there is sufficient personal estate to satisfy her thirds without resorting to the slaves, they will be entitled to their

FREEDOM. (*Continued.*)

- freedom, although the executor should have assigned them to the widow in part satisfaction of her claim. *Negro George Thompson v. Walter Clarke*, 145.
13. If a female slave be sold, to serve the vendee for a term of years, with an obligation by the vendee to manumit her at the expiration of the term, and if, during the term, she has issue, such issue is entitled to freedom. *Negro Sarah v. Taylor*, 155.
 14. In Virginia, a person who has been in possession of a slave for five years, need not show the deed under which he claims title. *Love v. Boyd*, 156.
 15. A slave brought into the county of Washington, from Maryland, by his owner, and, within three years thereafter, mortgaged for his full value, does not thereby acquire a right to his freedom. *Negro Sam Bias v. Rose*, 159.
 16. A slave cannot bind himself at law to pay money to his master, even for his freedom. *Contee v. Garner*, 162.
 17. A slave does not acquire freedom by an importation and continuance a year in Alexandria, unless he continue there one year under the same master or owner. *Negro Sam v. Green*, 165.
 18. The lapse of nine years since the plaintiff arrived at the age of twenty-one years, does not create a presumption that the oath was taken by the person who brought the plaintiff into Virginia. *Negro Sam Reeler v. Robinson*, 220.
 19. If a citizen of the United States, owning a slave in Virginia, and residing there, removes to the county of Washington, in the District of Columbia, with a *bonâ fide* intention of settling therein; and afterward causes the said slave to be brought into the county, through the county of Alexandria, within one year after such removal; and if the owner, within three years after such removal, sell the said slave, he thereby becomes entitled to freedom, notwithstanding the Acts of Congress of the 3d of May, 1802, § 7, and 12th of June, 1812, § 9, — the said slave having been in Alexandria county merely *in transitu*. *Negro Leonard Dunbar v. Ball*, 261.
 20. From a power to hire out a slave and receive his wages, the jury cannot infer a power to sell him. *Negro Daniel v. Kincheloe*, 295.
 21. No executory contract between a master and his slave can be enforced either at law or in equity. *Negro Joseph Brown v. Wingard*, 300.
 22. See EVIDENCE, 20. *Humphries v. Tench*, 337.
 23. In suits for freedom, the Court will not question the jurors as they are called up to be sworn, as to their prejudices or prepossessions in favor of freedom, but leave the parties to their challenges. *Negro Matilda v. Mason*, 343.
 24. See EVIDENCE, 126. *Ibid.*
 25. To obtain freedom under the Maryland Act of 1796, c. 67, the slave must have been imported "for sale" or "to reside." *Negro William Jordan v. Sawyer*, 373.
 26. A slave imported into the county of Washington, District of Columbia, for sale, and sold within three years after such importation, is entitled to freedom, although the object and intention of both purchaser and seller, were, that the slave so purchased should be carried, forthwith, out of the District of Columbia, by the purchaser. *Ibid.*
 27. A Virginia slave is not entitled to freedom, under the Maryland of 1796, c. 67, by being hired to a resident of the county of Washington, for a limited period. *Negro Vincent Gardner v. Simpson*, 405.
 28. A slave carried from Washington, District of Columbia, to Virginia, by her owner, for a temporary residence only, and brought back to Washington, and there sold to a resident of Washington, does not thereby become entitled to freedom under the Maryland Act of 1796, c. 67. *Negro Amelia v. Caldwell*, 418.
 29. A slave who has been manumitted and has lost her deed of manumission, may have relief in equity. *Negro Alice v. Mortè*, 485.
 30. Upon a petition for freedom, suggesting an apprehension that the defendant will sell and remove the petitioners from the jurisdiction of this Court, supported by affidavit, a judge of this Court, in vacation, will order an injunction without security; and upon further affidavit that the defendant had attempted to carry the petitioners away, after notice of filing their petition, the judge will order the marshal to take them into custody for safe keeping, until the defendant shall give the security required by law for their forthcoming, to prosecute their petition; and if the defendant shall refuse to give such security, and judgment shall

FREEDOM, (*Continued.*)

- be rendered against him, the marshal's fees for keeping them shall be taxed in the bill of costs against the defendant. *Negro Rebecca v. Pumphrey*, 514.
31. Children of a female slave, born while the mother was in the temporary service of a vendee for years, are slaves of the vendor, or vendee,—*quære*, which? *Negro Peter et al. v. Preuss et al.* 561.
 32. A female slave, purchased by the defendant at her request, to enable her to obtain her freedom by repayment of the purchase-money, is not entitled to judgment in her favor until she has repaid the whole purchase-money; and if she had repaid the whole purchase-money, *quære*, whether she would be entitled to judgment in her favor, either at law or in equity, without a deed of manumission? *Negro Letty and Child v. Lowe*, 634.
 33. If the owner of a slave in the county of Washington carries her to a foreign country, with intent there to reside permanently, and does there reside with her more than twelve months; and is then compelled to quit that country and returns to the county of Washington, bringing the slave with him, there to reside, the slave, by such importation, becomes entitled to her freedom. But if the owner be sent to such foreign country as a special agent of the Government of the United States, at a stated salary, with an uncertainty, depending upon contingencies, whether he should remain there or return, after accomplishing the purpose of his mission, and was compelled to leave the country before he has actually settled himself as a permanent resident there, then the taking of the slave with him, and bringing her back, is not an importation against the Maryland Act of 1796, ch. 67. *Negro Fanny v. Tippet*, 463.
 34. There can be no binding contract between a slave and his master. *Negro Fanny v. Kell*, 412.
 35. A child of a female slave is a slave, although the mother has the promise of the master, that she shall be free at the end of a certain number of years. *Ibid.*

FREE NEGROES.

The clause in the Charter of Washington, which gives power to the corporation "to prescribe the terms and conditions upon which free negroes and mulattoes may reside in the city," is applicable only to those persons of color who come to reside in the city after the promulgation of such terms and conditions. Neither that clause, nor the by-law of April 14, 1821, ch. 133, is unconstitutional in its prospective operation. *Billy Costin v. Corporation of Washington*, 254.

FREIGHT.

The equitable owner of a ship in his possession has an insurable interest in the freight. *Simmes v. Marine Ins. Co. of Alexandria*, 618.

GAMING.

1. See CHEAT. *United States v. Bascadore*, 25.
2. See BY-LAW, 2. *United States v. Wells*, 45.
3. An information will not lie upon a presentment of a grand jury for public gaming contrary to the Virginia Statute of December 8, 1792, § 5, p. 175. *United States v. Rounsavel*, 133.
4. See BY-LAW, 6. *McLaughlin v. Stephens*, 148.
5. A note given as indemnity to the bail, who had paid off a judgment obtained against his principal for a gaming debt, and for which the bail was liable, and had become fixed before he received the note, was not a note, the consideration of any part of which was for money or other valuable thing won at any game, within the meaning of the Virginia statute against gaming. *Welford v. Gilhwin*, 556.
6. The statute of gaming may be given in evidence upon *non assumpsit* without notice. *Watson v. Bayley*, 167.

GAOL.

1. The Levy Court of Washington County is not bound to repair the gaol erected by the United States in that county. *Levy Court v. Ringgold*, 659.
2. The marshal had no right to expend the funds of the Levy Court of Washington County in repairs of the gaol without their order. *Ibid.*

GARNISHEE.

1. The Court will set aside a judgment against a garnishee, obtained by surprise, and will quash the execution issued thereon. *Homans v. Coombe*, 681.
2. A court of equity will grant an injunction to stay execution upon a judgment

GARNISHEE, (Continued.)

obtained against a garnishee by surprise, and will continue it till final hearing. *Baker and Dyer v. Glover*, 682.

GRAND JUROR.

Witnesses cannot be sent to the grand jury on the part of the accused: nor can a grand juror be withdrawn, after he is sworn, for a cause which existed before he was sworn. *United States v. Palmer*, 11.

GUARDIAN.

A guardian is liable for waste, and entitled to credit for permanent improvements and the education of the children. *Williams v. Barrett*, 673.

HABEAS CORPUS.

1. A warrant of commitment must be under seal of the committing magistrate, and must show a charge upon oath. *Bennett's case*, 612.
2. If the commitment be informal or insufficient, the Court will discharge the prisoner upon that commitment, but will recommit him in proper form, if there be sufficient cause. If the commitment be regular and formal, and for an offence for which the committing magistrate had a right to commit, it seems that the Court upon *habeas corpus*, will, at the request of the prisoner, issue a *certiorari* to the magistrate to certify the informations, examinations, and depositions, taken by, and remaining with him, in relation to the commitment; and if none such shall have been taken, will summon him to appear and state upon oath the evidence upon which he issued his warrant of commitment, and upon ascertaining such evidence, will consider the same; and will bail, remand, or discharge the prisoner, unless he shall desire that the witnesses may be reexamined; in which case he will be remanded until the witnesses can be had. *Ibid.*
3. If a debtor who has been discharged under the insolvent act of the District of Columbia be arrested upon a *ca. sa.* issued by a justice of the peace for a debt accruing before his discharge, this Court may discharge him upon *habeas corpus*. *Reardon's case*, 639.

HIRE

If I hire a slave for a year, and he be arrested for theft at any time during the year, and imprisoned therefor during the residue of the term for which I have hired him, I must pay the stipulated hire, and suffer the loss of service. *Scott v. Bartleman*, 313.

HORSE-STEALING.

1. Horse-stealing in the District of Columbia is punishable as ordinary larceny under the Act of Congress of the 30th of April, 1790, although by the Acts of Maryland, 1793, ch. 57, § 10, and 1799, ch. 61, §§ 1 and 3, the punishment is death, or labor on the roads in Baltimore County. *United States v. Samuel Black*, 195.
2. Where the punishment may be death, the Court will allow peremptory challenge. *Ibid.*
3. A prisoner indicted for horse-stealing in Washington County, D. C., is not entitled to the right of peremptory challenge. *United States v. Krouse*, 252.

IMPRESSMENT.

A commanding officer of the militia has no lawful authority to impress the horse of a citizen, even in time of war. *Jacobs v. Levering*, 117.

IMPRISONMENT.

Upon conviction of cheating at cards, the Court will add imprisonment to the fine assessed by the jury. *United States v. Bascadore*, 25.

INDICTMENT.

1. An indictment for forcibly taking bank-notes from another, must state whose property they were. *United States v. McNamara*, 45.
2. The Court will not quash an indictment because there was no previous presentment or order of the Court. *United States v. Tompkins*, 46.
3. Two or more counts for misdemeanor may be joined in one indictment. *United States v. Porter*, 60.
4. The person defrauded is a competent witness for the prosecution upon an indictment for the fraud. *Ibid.*
5. Upon an indictment for barratry, no evidence can be given of specific acts without notice. Notice given after the commencement of the trial is too late. *Ibid.*

INDICTMENT, (*Continued.*)

6. A witness is incompetent who has been convicted of a conspiracy to defraud the creditors of an insolvent debtor. *Ibid.*
7. A grand juror may be required to testify as to the evidence given to the grand jury. *Ibid.*
8. Fraud is not indictable unless it concern the public, or be committed by false tokens or false pretences. *Ibid.*
9. The Court will strike an attorney from the roll for mal-practice, although it be not indictable. *Ibid.*
10. See FORGERY, 4. *United States v. Wright*, 68.
11. See EXTORTION. *United States v. Chénault*, 70.
12. An indictment will not lie against an inhabitant of the City of Washington for retailing spirituous liquors within the city. *United States v. Jacob Dixon*, 92.
13. See FORGERY, 5. *United States v. Bennett Smith*, 111.
14. An indictment will not lie against a person for dealing with a slave without his master's consent, the statute having provided a different mode of prosecution. *United States v. Pickering*, 117.
15. The jury may find the prisoner guilty of simple larceny upon an indictment for feloniously breaking a storehouse and taking therefrom goods of the value of more than four dollars, against the Virginia statute of 26th of December, 1792, which takes away the benefit of clergy. *United States v. Read*, 198.
16. In an indictment under the 18th section of the Act of the 30th of April, 1810, "regulating the post-office establishment," against a person employed in a department of the general post-office, charging him with embezzling letters with which he was intrusted, and stealing therefrom sundry bank-notes, it is not necessary to aver that the letters were intended to be conveyed by post, nor to describe particularly the letters or the bank-notes, it being averred that the particular description of the letters and of the bank-notes was unknown to the grand jurors. *United States v. Richard Golding*, 212.
17. It is not a valid objection to the indictment, that the embezzlement of the letters and stealing therefrom the bank-notes are charged in the same count in the indictment. *Ibid.*
18. See FORGERY, 9, 10. *United States v. Book*, 294.
19. Cruelly, inhumanly, and maliciously to cut, slash, beat, and ill treat one's own slave, is an indictable offence. *United States v. Brockett*, 441.
20. See FALSE PRETENCES. *United States v. Carico*, 446.
21. See EVIDENCE, 166. *United States v. Rutherford*, 528.
22. See EVIDENCE, 185. *United States v. Wurd and Young*, 680.
23. *Quære*, whether an indictment will lie at common law for enticing away a slave? *United States v. Negro Pompey*, 246.
24. Public cruelty to a horse is an indictable offence. *United States v. Logan*, 259.
25. See EVIDENCE, 7. *Veitch & Co. v. Basye*, 6.

INJUNCTION.

1. See EQUITY, 5. *Grundy v. Young*, 114.
2. *Id.* 6. *Fairfax v. Hopkins*, 134.
3. *Id.* 9. *Van Ness v. United States*, 376.
4. See FREEDOM, 30. *Negro Rebecca v. Pumpkrey*, 514.
5. See GARNISHEE, 2. *Baker et al. v. Glover*, 682.
6. Although a dedication of a lot to pious uses may be too vague an appointment to be carried into effect in a court of equity, upon general principles; yet if it has been long occupied for those uses, with the knowledge and consent of the donor, his heirs may be perpetually enjoined from disturbing the possession. *Kurtz et al. v. Beatty et al.* 699.
7. See EQUITY, 14, 18, 21, 23. *Robinson v. Cathcart*, 590.

INSANITY.

- A prisoner should not be found guilty if, at the time of committing the act, he was in such a state of mental insanity, not produced by the immediate effects of intoxicating drink, as to have been unconscious of the moral turpitude of the act. *United States v. Michael Clarke*, 158.

INSOLVENT.

1. See BAIL, 1. *Brough v. Noland*, 2.
2. A debtor committed upon a *ca. sa.* issued from a court of the United States cannot be discharged in Virginia by two justices of the peace under the provision of the law of that State. *Knox et al. v. Summers et al.* 12.

INSOLVENT, (*Continued.*)

3. In a suit by the trustee of an insolvent debtor, a creditor of the insolvent is not a competent witness. *Herbert v. Finlay et al.* 12.
4. If the defendant has been discharged under the insolvent law upon a *capias ad respondendum*, the marshal will be discharged from his amercement for not bringing him in at the return of the writ, upon the defendant's entering his appearance in proper person. *Trundle v. Heise*, 44.
5. See AFFIDAVIT, 6. *Way v. Selby*, 44.
6. If a defendant arrested upon a *capias ad respondendum*, be discharged under the insolvent act, before the return of the writ, and fails to appear, the marshal cannot be amerced. *Williams v. Craven*, 60.
7. If the principal has been discharged under the insolvent law of Maryland, the bail will be discharged. *Burns v. Sim's Bail*, 75.
8. See BAIL, 9. *Bussard v. Warner's Bail*, 111.
9. The act of limitations runs in favor of an insolvent debtor, notwithstanding his discharge under the insolvent act. *Denny v. Henderson*, 121.
10. The common printed form of the deed from an insolvent debtor to his trustee under the insolvent act, is sufficiently certain to convey to the trustee a title to slaves. *Watson v. Hall*, 154.
11. The Court will not on motion quash a *ca. sa.* issued by the clerk of this Court upon a judgment of a justice of the peace, upon the ground that the defendant has applied for the benefit of the insolvent laws of Maryland and had obtained an order and given bond for his appearance in St. Mary's county, Maryland, but has not yet obtained his final discharge. *Mattingly v. Smith*, 158.
12. An attachment for rent not due is superseded by the tenant's discharge under the insolvent act of the District of Columbia. *Keene v. Jackson*, 166.
13. See BAIL, 13. *Munroe v. Towers*, 187.
14. See BAIL, 14. *King v. Simm*, 234.
15. A debtor discharged under the insolvent act cannot be arrested for a debt contracted before his discharge, although not payable till after his discharge. *James Anderson's case*, 243.
16. See COSTS, 9, 10. *Emerson v. Beale*, 349.
17. Upon the trial of an issue upon allegations filed by the creditors of an insolvent debtor to prevent his discharge, he must produce his books of account if called for. *Henry Hadry's case*, 364.
18. An insolvent debtor arrested for a debt due before his discharge, can only be relieved by the court before whom the process is returnable. *Frere v. Mudd*, 407.
19. The allegations filed to deprive a debtor of the benefit of the insolvent act must be specific and certain. *John Connelly's case*, 415.
20. The refusal of a judge to discharge the debtor, if the proceedings were irregular, is no bar to his discharge upon a subsequent application. All the orders and proceedings must be by the judge to whom the application is made. *Ibid.*
21. An insolvent debtor who has within twelve months next before his application for the benefit of the insolvent act, assigned part of his property to give a preference to a creditor or surety, may withdraw his application and make a new application after the expiration of the year; and such withdrawing will be no bar to his relief upon his second application. *Thomas Crawford's case*, 454.
22. The judge will not direct interrogatories to be filed, nor an issue to be tried, upon vague allegations, nor unless the allegations charge the debtor with having conveyed, lessened, or disposed of part of his property, rights, or credits, with intent to defraud his creditors; or with having, at any one time within twelve months next preceding his application, lost by gaming more than \$300; or with having, within the said twelve months assigned or conveyed a part of his property, rights, and credits, with intent to give a preference to a creditor or surety. A preference given more than a year before the application for relief, is no bar thereto. *Ibid.*
23. If an insolvent debtor upon allegations filed, be found guilty of having disposed of his property with intent to defraud his creditors, he will be ordered into close custody, and precluded from any benefit under the insolvent act. *Daniel Donoghue's case*, 466.
24. Upon trial of the issue upon allegations filed against an insolvent debtor, it is incumbent upon the persons filing the allegations, to show that they are credit-

INSOLVENT, (*Continued.*)

- ors of the insolvent. After the jury is sworn the Court will not permit the allegations to be amended by inserting the name of another creditor. The judgment upon verdict against the debtor is, "That he be precluded from any benefit under the act entitled," &c. *Walter Newton's case*, 467.
25. The judgment lien upon the lands of an insolvent debtor is not destroyed by the 5th section of the insolvent act, although there was no process of execution thereupon in the hands of the marshal at the time of the debtor's application for relief under the act. *Farmers Bank of Alexandria v. Robbins*, 471.
 26. Upon the trial of the issue upon allegations of fraud against an insolvent debtor, it must appear that the intended fraud was against creditors who were such at the time of the supposed fraudulent conveyance, and at the time of trial. *Ex parte Henry Knowles*, 576.
 27. A *bonâ fide* sale by the debtor, of his property or any part of it, for the purpose of paying certain preferred creditors, to the exclusion of others, is not a fraud of which he can be convicted upon allegations filed under the insolvent act. *Ibid.*
 28. The inserting in the deed, a consideration less than the true consideration paid, is not, of itself, a fraud, if a fair, valuable, *bonâ fide* consideration was paid, or contracted to be paid. *Ibid.*
 29. A deed void as to creditors because not accompanied and followed by possession, although technically fraudulent as to creditors, is not evidence of fraud of which the debtor can be convicted upon allegations under the insolvent act, if there was a real, *bonâ fide* consideration. *Ibid.*
 30. Upon the trial of an issue upon allegations under the insolvent act, the burden of proof is on the complaining creditors to show the fraudulent intent. *Ibid.*
 31. A discharge from commitment on a *ca. sa.* under the insolvent act of the District of Columbia, is no discharge of the debt; but the plaintiff may resort to the lien of his judgment upon the lands of his debtor, although sold and conveyed away by him while the plaintiff was pursuing his remedy against the person of his debtor; and although the plaintiff had obtained judgment against him and his sureties on his prison-bonds bond. *Owen et al. v. Glover*, 578.
 32. See HABEAS CORPUS, 3. *Reardon's case*, 639.
 33. If a defendant who is out upon a prison-bonds bond given upon a *capias ad respondendum* petitions for the benefit of the insolvent act, and upon allegations filed is found guilty in a summary proceeding before a judge who orders him into close custody, and that he be precluded from any benefit under the act, whereupon the debtor was committed to close custody and afterwards escapes; the creditor at whose suit he was taken cannot maintain an action upon the prison-bonds bond for that escape. *Keirll v. McIntire*, 670.
 34. *Quere*, whether if a petitioning debtor be convicted of frauds upon allegations, in a summary proceeding before a judge out of court, the judge has authority to order him into close custody; or whether the judge is merely to refuse to grant him the relief he seeks under the act. *Ibid.*

INSTRUCTION.

1. Upon a prayer for instruction to the jury, the Court, in considering the question whether the jury can, from the evidence, infer the facts necessary to justify the instruction prayed, must decide in the same manner as they would upon a demurrer to evidence, and will consider all those facts as proved which the jury could legally infer from the evidence. But upon the question whether the instruction prayed be justified by the facts stated in the prayer, the Court is bound to decide upon those principles which ought to govern them in deciding upon a special verdict. The ultimate facts upon which the party relies, must be expressly and absolutely stated; the Court can infer nothing. *Bank of Alexandria v. Deneale*, 488.
2. The Court will not instruct the jury upon a question of art depending upon nautical skill, and upon which the Court could not give an opinion without consulting persons skilled in nautical matters. *Howland v. Marine Insurance Co.* 474.

INSURANCE.

1. The members of an insurance association are bound by the act of the majority, unless there be some restriction in the articles of association. *Deane v. Tucker*, 26.
2. Information received by an agent of the insured, of the loss of the property be-

INSURANCE, (*Continued.*)

- fore insurance effected, will not vacate the policy unless that agent be the agent who obtains the insurance, or gives the information to the person who obtains it. *Patton v. Janney*, 71.
3. If several actions against several underwriters upon the same policy, are submitted to the same jury at the same time, and the jury find verdicts against some of them, but wish to reconsider as to the others, those underwriters against whom the verdicts are found, cannot be examined as witnesses for the others. *Ibid.*
 4. In ascertaining whether the loss upon a policy of marine insurance amounts to five per cent. a deduction must be made of one third of the cost of the repairs as an allowance for the difference of value between the new and the old materials. *Sanderson v. Columb. Ins. Co* 218.
 5. The Columbian Insurance Co. of Alexandria cannot by a trustee, vote in an election of directors of the company, upon stock of the same company, purchased by them and held for their use in the name of the trustee. *United States v. Columb. Ins. Co. of Alexandria*, 266.
 6. The fact that insurance was made cannot be proved without producing the policy or showing it to be lost. *Hutchinson et al. v. Peyton et al.* 365.
 7. If a policy of insurance be made for six months on a vessel, stated in the policy to be then bound on a voyage from Georgetown to Madeira and a market between Cape Finisterre and Naples, with liberty, after the expiration of six months to freight, or trade for six months more on a premium of $5\frac{1}{2}$ per cent; the risk for the second six months is upon time only, and the vessel, having performed the voyage described in the policy, in the first six months, had a right to go to Brazil. *Stuart v. Columb. Ins. Co. of Alexandria*, 442.
 8. The owner of a vessel who has contracted to sell her for a certain sum, and to make a title to the vendee, upon payment of the price, has an insurable interest to the full extent of the value of the vessel, and not merely to the extent of the price for which he has contracted to sell her. *Ibid.*
 9. In an action upon a valued policy on a cargo, the defendants will not be permitted to give evidence of its actual cost. The policy was on a voyage "at and from Rio Janeiro to Santos and two ports in South America, and at and from either of them to a port of discharge in the West Indies, or Europe, or the United States," upon goods "at and from Rio Janeiro," until they shall "be safely landed at Santos, &c.," "valued at the sum insured," (viz. \$3,500,) "on her cargo of salt, and on the proceeds, as interest may appear." These words do not justify an inference on the part of the underwriters, that the goods were to be laden on board at Rio Janeiro. The cargo was lost between Rio Janeiro and Santos, and the plaintiffs recovered for the loss, although the cargo was laden at Cadiz. *Gardner v. Col. Ins. Co. of Alexandria*, 473.
 10. The mere stranding of a ship on a bar, will not, of itself, justify an abandonment of the ship to the underwriters, but the master and crew are bound to use their best exertions to get her off. If the stranding were produced by want of skill on the part of the master, or by the want of that degree of care and prudence, which a skilful a prudent master of such a vessel would exercise in similar circumstances, or if, after she was stranded, he neglected to use all reasonable means to save her, the loss is not covered by the policy. But if the master and crew were competent, and all reasonable care was used to avoid the accident, and all reasonable exertions were used, honestly and with good faith to prevent the wreck and destruction of the property, and it was, nevertheless, lost, then the loss is within the policy. *Howland v. Marine Ins. Co. of Alexandria*, 474.
 11. If the stranding was of such a character, as to render it, in the exercise of good judgment, hopeless to get the vessel off, then the abandonment was justified, and the loss was within the policy. If the bar, on which a vessel is stranded, is out of the due course of the voyage insured, and the deviation be voluntary, or produced by want of skill in the navigation of the ship, or by the want of that degree of care and diligence on the part of the master and crew which a prudent and skilful master and crew would use in like circumstances, the insurers are discharged. *Ibid.*
 12. The question of negligence of the master of a vessel, in conducting the voyage, is to be left to the jury under all the circumstances of the case as they appear in evidence. *Ibid.*

INSURANCE, (*Continued.*)

13. Upon a valued policy, by which "T. H. H. on account of himself and J. J." caused a ship to be insured by the defendants in the sum of \$10,000, T. H. H. may, alone, maintain an action in his own name, and recover judgment for the whole amount insured, although the declaration avers that the plaintiff and the said J. J. were interested in the ship to the amount insured. *Ibid.*
14. An offer to abandon the insured vessel, made as soon as the assured obtains the preliminary proofs of loss, to be laid before the underwriters, is not too late. *Gardner v. Col. Ins. Co. of Alexandria*, 550.
15. Upon a valued policy, evidence of over-valuation is not admissible, unless in support of an allegation of fraud. *Ibid.*
16. A person, for whose use a vessel worth three or four thousand dollars, was built, and who held the builder's bond of conveyance of the same, upon the payment of \$1,260, and who had the entire use and possession of the vessel, had an insurable interest in the freight, and truly represented himself to the underwriters as the owner of the vessel, although the register was in the name of the builder, and that fact not disclosed to the underwriters at the time of executing the policy. *Sinmes v. Marine Ins. Co.* 618.
17. Upon an open policy from St. Thomas to Havana, it was not necessary to disclose the fact that the vessel had sailed from Alexandria to Buenos Ayres, where a part of the cargo was discharged, and thence to St. Thomas. *Ibid.*
18. The owner of a vessel is entitled to reasonable freight only, unless he shows an express contract for a specific sum or price. The bill of lading is not conclusive evidence of such a contract. The bond of conveyance of the vessel by the builder to the plaintiff, was not conclusive evidence that the ownership, so far as the freight was concerned, was in the builder at the time of the insurance. *Ibid.*
19. It was no valid objection to the plaintiff's recovering freight from the Danish island, St. Thomas, to the Spanish colony, Havana, that the vessel had been chartered at Buenos Ayres, then in a state of revolt against Spain by Danish subjects, resident at St. Thomas, for a voyage from Buenos Ayres to Havana, with leave to stop at St. Thomas; where she did stop and change her papers, and took a new bill of lading without unlading the cargo. *Ibid.*

JOINT DEFENDANTS.

1. If one of three joint defendants pay the whole debt upon a joint execution, for a debt contracted by them jointly, in a transaction in which they were partners, he cannot, at law, recover from the other partners their respective proportions of the whole debt which he has thus paid. *Riggs v. Stewart*, 171.
2. If the writ be issued against two defendants, and one only be taken on the first writ and the other be afterward taken on an *alias*, or *pluries*, the cause against the defendant first taken will be consolidated with that against the other defendant, although there may have been the intermission of a term between the issuing of the first and second or other writ. *Smith v. Woodward and Yerby*, 226.
3. If the declaration be against three jointly, upon a joint *assumpsit*, and one of them only be taken, who pleads *non assumpsit*, for himself alone, and a verdict be rendered for the plaintiff, the judgment will be arrested, unless the other joint defendants shall have appeared, or process shall have been issued and continued against them up to the time of trial. *Edmondson v. Barrell*, 228; *Nichols v. Fearson*, 526.
4. In an action against two defendants, if one be taken, and issue be joined, and plea waived and judgment confessed against him, after the other had been taken, and before the cause is at issue against him, the judgment may be set aside for irregularity, and the two cases consolidated, and the issues made up and set for trial. *Nyer et al. v. Hyatt and Wilson*, 633.
5. In a joint action against two defendants, if one only be taken on the first writ, and the other be taken on a subsequent writ, and the plaintiff, not knowing that this other had been taken, alters his declaration by stating that he had not been taken, and proceeds to judgment against the defendant first taken; the Court will, at a subsequent term, permit the judgment to be set aside, and the declaration to be restored to its original form, and the cause to proceed as a joint action against both. *Newton v. Weaver and Burdick*, 685.

JUDGMENT.

1. In Virginia, a judgment by confession is equal to a release of errors; and the Court will not grant a writ of error *coram vobis* upon a suggestion of the death

JUDGMENT, (*Continued.*)

- of the plaintiff, where the justice of the case does not seem to require it, nor will they quash a *juri facias*, issued in favor of the plaintiff's administrator, upon suggestion of the death of the administrator, after the award of execution. *Catlett v. Cooke*, 9.
2. *Nil debet* is not a good plea to an action of debt upon a judgment of a court of one of the States; but the defendant may, by leave of the Court, withdraw it and plead *nul tiel record*, upon payment of the costs of the term, and a continuance of the cause, if the plaintiff should desire it. *Short v. Wilkinson*, 22.
 3. See EXECUTION, 1. *Fitzhugh v. Blake*, 37.
 4. The defendant upon *non assumpsit*, may give in evidence a former recovery of judgment against him upon an attachment in a court in Virginia, and such former judgment is a good bar to the action here. *Stone v. Stone*, 119.
 5. Judgment on motion and notice cannot be obtained upon a bond given to secure rent upon an attachment, on a suggestion that the tenant is about to remove. *Simpson v. Legg*, 132.
 6. The right of the United States to summary judgment under the Act of Congress of March 3, 1797, c. 74, § 3, does not extend to suits brought by the United States as indorsees of promissory notes. *United States v. Blacklock*, 166.
 7. A judgment against the principal debtor in a foreign attachment in Pennsylvania is not evidence, in the District of Columbia, of a debt due by him to the plaintiff. *Ricketts et al. v. Henderson*, 157.
 8. The Act of Limitations of Virginia of the 19th of December, 1792, is not a bar to a judgment, if execution has been issued and returned within ten years after the date of the judgment. *Irwin v. Henderson et al.* 167.
 9. See DEMURRER, 3. *Ibid.*
 10. The Court, at a subsequent term, will set aside a judgment irregularly obtained, and quash the execution issued thereon. A judgment by default for want of a plea, before the expiration of the rule to plead, is irregular, and may be set aside on motion at a subsequent term. *Union Bank v. Crittenden*, 238.
 11. The Maryland Act of 1763, c. 23, § 4, does not dispense with the rule to plead, although the declaration be sent and served with the writ twenty days before the appearance term. *Ibid.*
 12. There can be no judgment in Washington County, D. C., against an executor or administrator for a debt of the testator or intestate until the Court shall have ascertained the assets and assessed the sum for which the judgment shall be rendered against the executor or administrator, *de bonis propriis*. *Bank of Washington v. Peltz's Administrator*, 241.
 13. A judgment of the Circuit Court, D. C., cannot be superseded without two sureties. *Mandeville v. Love*, 249.
 14. See DEMURRER, 9. *Bank of the United States v. Smith*, 319.
 15. See BILLS AND NOTES, 59. *Ibid.*
 16. See BOOKS AND PAPERS, 1. *Maye v. Carbery*, 336.
 17. *Id.* 1. *Bank of the United States v. Kurtz*, 342.
 18. A judgment upon a special verdict, or upon a verdict subject to the opinion of the Court upon a case stated, does not relate back to the date of the verdict, so as to overreach an intermediate judgment against the same defendant in another cause. *Bank Metropolis v. Walker*, 361.
 19. Upon motion of the special bail, at the return of the *scire facias*, the Court will set aside the original judgment against the principal for irregularity, and will quash the *scire facias* against the bail. *Ault v. Elliot*, 372.
 20. A *supersedeas* judgment must recite the original judgment correctly. *Holmes v. Bissard*, 401; *McSherry v. Queen*, 406.
 21. See COSTS, 12. *Blagrove v. Ringgold*, 407.
 22. A judgment for the defendant, in replevin, without a declaration, is irregular, and will on motion be set aside, even at a subsequent term. *Ringgold v. Elliot*, 462.
 23. See INSOLVENT, 24. *Walter Newton's case*, 467.
 24. *Id.* 25. *Farmers Bank v. Robbins*, 471.
 25. The United States are entitled to judgment at the return term upon revenue bonds, although, by the general rule and practice of the Court, the day after the last day of the term is the appearance day to all writs returnable to that term, and the Court will, upon motion, rule the marshal to return the writ on some day during the term. *United States v. May et al.* 507.
 26. If the issue of "never executor" be found against the defendant, the judgment

JUDGMENT, (*Continued.*)

- will be *de bonis testatoris si, &c.*; *et si non, de bonis propriis.* *Peters v. Breckenridge*, 518.
27. A justice of the peace may render judgment by default against a woman who does not appear at the time and place named in the warrant. *Quære. Onil v. Hogan*, 524.
28. See ATTACHMENT, 20, 21, 22. *Jones v. Kemper*, 535.
29. The judgments which are made void by the Virginia statute against gaming are judgments voluntarily confessed by way of security for a gaming debt, not judgments rendered *in invitum*. *Welford v. Gilham*, 556.
30. See INSOLVENT, 31. *Owen et al. v. Glover*, 578.
31. See EQUITY, 24. *Farmers and Mechanics Bank v. Melvin*, 614.
32. See INSOLVENT, 33. *Keirll v. McIntire*, 670.
33. See ATTACHMENT, 35. *Homans v. Coombe*, 681.
34. See GARNISHEE, 1. *Ibid.*
35. *Id.* 2. *Baker and Dyer v. Glover*, 682.
36. See JOINT DEFENDANTS, 5. *Newton v. Weaver*, 685.
37. See WARRANT, 5. *Boothe v. Corporation of Georgetown*, 356.

JURISDICTION.

1. See INSOLVENT, 2. *Knox v. Summers*, 12.
2. See FERRIES, 1. *Berry's case*, 13.
3. *Id.* 2. *Young's case*, 453.
4. A creditor may give a credit upon his account so as to give jurisdiction to a justice of the peace. *Porter v. Rapine*, 47.
5. A person who steals goods in Maryland and brings them here is guilty of larceny here. *Quære. United States v. Haukey*, 65.
6. See BY-LAW, 3. *Joseph Dean's case*, 125.
7. Upon a common-law attachment under the Virginia statute of December 26, 1792, § 6, the Court may, in its discretion, suffer the principal defendant to appear without bail and without discharging the attached effects, at the first term after the return of the attachment, to plead to the jurisdiction. *Locke v. Cannon*, 186.
8. If the verdict be below the jurisdiction of this Court the jury is not entitled to the fee of twelve shillings. *Skinner v. McCaffrey*, 193.
9. A justice of the peace has no jurisdiction of an action against an administrator. *Ritchie v. Stone*, 258.
10. No appeal lies from the judgment of a justice of the peace imposing a fine for profane swearing in his presence. *Howard v. United States*, 259.
11. The Court has authority to suspend an attorney of the Court from practice for a limited time, or to expel him entirely: and may, for that purpose, inquire in a summary manner as to any charges of malpractice alleged against him. *Levi S. Burr's case*, 379.
12. In cases of bastardy this Court has no jurisdiction unless upon complaint of the overseers of the poor of the county. *United States v. David Dick, Jr.* 409.
13. If a warrant contain on its face a cause of arrest within the jurisdiction of the magistrate, and purports to have been issued within the local jurisdiction of the magistrate, and is in other respects formal, the officer is bound to execute it, and resistance is unlawful, although, in fact, the offence was not committed within the local jurisdiction of the magistrate. *United States v. Thompson*, 409.
14. If a man steal goods in North Carolina and bring them here, he is guilty of larceny here. *United States v. Mason*, 410.
15. A dead man cannot be the owner of goods. It is not sufficient to state them to be the goods of one A. B., deceased. *Ibid.*
16. This Court has no jurisdiction in assault and battery by a slave on a white man, and will order him to be taken before a justice of the peace to be dealt with according to law. *United States v. Negro E. Dick*, 412.
17. A creditor has no right to give a false credit upon a note so as to reduce it to the jurisdiction of a justice of the peace. *Cazenove v. Darrel et al.* 444.
18. All the orders and proceedings in a case under the insolvent act, must be by the judge to whom the application was made. *John Connelly's case*, 415.
19. A justice of the peace, under the Act of Congress for extending the jurisdiction of justices of the peace, has not jurisdiction of suits against administrators. *Adams v. Arnold*, 422.
20. If a creditor gives a credit upon his account so as to bring it within the jurisdiction of a justice of the peace, and if the debtor does not object to the credit

JURISDICTION, (*Continued.*)

- before the justice, his assent to the credit will be presumed. *Maddox v. Stewart*, 523.
21. No appeal lies from the judgment of a justice of the peace rendered upon the verdict of a jury. *Ibid.*
 22. A creditor cannot, without the consent of the debtor, relinquish part of his claim so as to bring it within the jurisdiction of a justice of the peace. *Burton v. Varnum*, 524.
 23. If an entire debt of \$250 be settled by the debtor's giving his five several promissory notes for \$50 each, payable at different times, each note is within the jurisdiction of a justice of the peace, and if all the notes have become payable, he may issue his five separate warrants and render judgment against the debtor in each case. *Moore v. Hough*, 561.
 24. Unless some party defendant, against whom an effectual decree can be made, be found within the District of Columbia, the Circuit Court of that district, as a court of equity, has no jurisdiction of the cause. *Vasse v. Comegys*, 564.
 25. Officers of the United States holding public money as money of the United States, are only accountable to the United States, and are not liable at the suit of an individual on account of having such public money in their hands. *Quære*, Where is the treasury of the United States? *Ibid.*
 26. A justice of the peace has jurisdiction in a case of a small debt, and his judgment is not absolutely void; and the officer who serves a *ca. sa.* upon that judgment is not a trespasser, although the plaintiff's proper remedy was upon the defendant's administration bond, the penalty of which was \$500, and so beyond the jurisdiction of the justice. *Mickum v. Paul*, 568.
 27. See ATTACHMENT, 31. *Dix v. Nicholls*, 581.
 28. See EXECUTORS, 7. *Nicholls v. Hodge*, 582.
 29. See ATTACHMENT, 33. *Miller v. Hobe et al.* 622.
 30. A debt of \$50, upon which interest is due, cannot be recovered before a justice of the peace. *Milburne v. Burton*, 639.
 31. See HABEAS CORPUS, 3. *Reardon's case*, 639.
 32. This Court has not jurisdiction of riot and assault and battery by slaves in the county of Alexandria. *United States v. Negro Calvin et al.* 640.
 33. If the justice of the peace had not jurisdiction of the cause, his judgment may be reversed upon appeal, although the cause was tried before him by a jury. *Cross v. Blanford*, 677.

JURY.

1. Alienage is not a cause of challenge of a juror. A challenge for favor is to be tried by the two first jurors sworn in the cause. *Mima Queen v. Hepburn*, 3.
2. If the jury give only one cent damages, believing that it would carry costs, when it would not, they will not be permitted after the verdict is taken and they have been discharged from the cause, to go out again to alter their verdict. *Snowden v. McGuire*, 6.
3. Under the Maryland Act of 1798, c. 101, ch. 8, § 15, the Court, and not the jury, is to ascertain whether the defendants paid away all the assets before notice of the plaintiff's claim. *Hellen v. Beatty*, 29.
4. Peremptory challenge is allowed upon an indictment for manslaughter in Alexandria. *United States v. Craig*, 36.
5. A grand juror may be required to testify as to the evidence given before the grand jury. *United States v. Porter*, 60.
6. Grand jurors may testify as to the confessions made by the prisoner before them upon oath when under examination as a witness against another person. *United States v. Negro Charles*, 76.
7. The Court will not receive evidence of the declarations of jurors that they assessed the damages by taking the average of the sums put down by each juror respectively. *Holmead v. Corcoran*, 119.
8. If the jury take out the coroner's inquest and depositions, and find the prisoner guilty of murder, a new trial will be granted. *United States v. Michael Clarke*, 152.
9. If the verdict be below the jurisdiction of the Court, the jury is not entitled to the fee of twelve shillings. *Skinner v. McCaffrey*, 193.
10. A juror who has a cause at issue which he expects will be tried at the same term, will be discharged; and if not discharged may be challenged. *Darius Chappett's case*, 247.

JURY, (*Continued.*)

11. See FREEDOM, 23. *Matilda v. Mason*, 343.
12. After the jury is sworn in a capital case, and the cause has been opened, the Court cannot, without the prisoner's consent, discharge a juror at his own request. *United States v. Negro Randall*, 412.
13. The Court, having doubts concerning their jurisdiction in appeal from a justice of the peace, in a cause tried before him by jury, requested the gentlemen of the bar, if so disposed, to argue the question; and for that purpose continued all the cases of appeal, over twenty dollars value, to the next term. *Sherburne v. Semmes*, 446.
14. A foreigner in Virginia, is entitled to a jury *de medietate linguæ*. *United States v. Carnot*, 469.
15. The Court will not instruct the jury upon a question of art depending upon nautical skill. *Howland v. Marine Ins. Co.* 474.
16. The question of the negligence of a master of a vessel in conducting the voyage, is to be left to the jury under all the circumstances of the case as they appear in evidence. *Ibid.*
17. It is good cause of challenge in a capital case, that the juror is a quaker, and has conscientious scruples of taking away human life for any offence. *United States v. Betsey Ware*, 477.
18. An appeal does not lie to this Court from the judgment of a justice of the peace in a cause which has been tried by a jury before the justice. *Davidson v. Burr*, 515.
19. See ACCOUNT, 1. *United States v. Rose*, 567.

JUSTICE OF THE PEACE.

1. A justice of the peace is not liable in an action of false imprisonment upon an illegal warrant issued by him, unless it be issued maliciously. *Neale v. Minifie*, 16.
2. Upon an appeal from the judgment of a justice of the peace, the cause is to be tried *de novo*. *Minifie v. Duckworth*, 39.
3. The word "seal" in a justice's warrant, is a seal. *United States v. Hedges*, 43.
4. A justice of the peace has no jurisdiction of an action against an administrator. *Ritchie v. Stone*, 258.
5. See APPEAL, 4. *Howard v. United States*, 259.
6. This Court has no jurisdiction to quash a *fiery facias* issued by order of a justice of the peace, by the clerk of this Court, nor to render judgment of condemnation of the rights and credits returned upon such *fiery facias* as levied upon by the constable in the hands of a third person. *Goulding v. Fenwick*, 350.
7. A warrant for a violation of a by-law should specify the by-law, and the manner of violating it. *Boothe v. Corporation of Georgetown*, 356.
8. No appeal lies to this Court from the judgment of a justice of the peace, for violating a by-law of Georgetown, District of Columbia. *Ibid.*
9. A justice of the peace in Alexandria county has no power to issue a *capias ad respondendum*, or warrant of arrest for a small debt before judgment. *Minor's case*, 404.
10. See INSOLVENT, 18. *Frere v. Mudd*, 407.
11. A signature in black-lead pencil of a warrant, by a justice of the peace, is not a sufficient signature in law. *United States v. Thompson*, 409.
12. See JURISDICTION, 13. *Ibid.*
13. *Id.* 17. *Cazenove v. Darrell et al.* 444.
14. A justice of the peace, under the Act of Congress for extending the jurisdiction of justices of the peace, has not jurisdiction of suits against administrators. *Adams v. Kincaid*, 422.
15. See JURY, 13. *Sherburne v. Semmes*, 446.
16. *Id.* 18. *Davidson v. Burr*, 515.
17. See JURISDICTION, 20, 21. *Maddox v. Stewart*, 523.
18. *Id.* 22. *Burton v. Varnum*, 524.
19. *Id.* 23. *Moore v. Hough*, 561.
20. See JUDGMENT, 27. *O'Neil v. Hogan*, 524.
21. See JURISDICTION, 25. *Mickum v. Paul*, 568.
22. The authority of a justice of the peace in one of the States, may be proved by parol. *Winter v. Simonton*, 585.
23. See JURISDICTION, 29. *Milburn v. Burton*, 639.

JUSTICE OF THE PEACE, (*Continued.*)

24. See HABEAS CORPUS, 30. *Reardon's case*, 639.
25. See APPEAL, 10. *Coumbe v. Nairn*, 676.
26. *Id.* 11. *Cross v. Blanford*, 677.
27. See BY-LAW, 13. *Delany v. Corporation of Washington*, 459.
28. A warrant issued by a justice of the peace for the penalty of a by-law ought to state all the circumstances required by the by-law to constitute the offence; but the Court will disregard all such defects as would be disregarded after verdict in an action of debt or information upon a penal statute. *McGunnigle v. Corp. of Washington*, 460.
29. This Court has no jurisdiction in assault and battery by a slave on a white man; and will order him to be taken before a justice of the peace to be dealt with according to law. (See the clerk's minute book, 14th of May, 1823.) *United States v. Negro Ellick*, 412.
30. *Quare*, as to tenure of office of a justice of the peace. *Davidson v. Burr*, 515.

LAND.

1. The statute of Virginia against conveying pretended titles does not vacate the deed as between the parties. If the creditor accepts a deed of land in payment of a debt, it is a bar to an action for the debt; and if the title be defective the creditor must look to his warranty. *Miller v. Young*, 53.
2. See FRAUD, 4. *Conway v. Sherron*, 80.
3. See CONTRACT, 2. *Dunlop v. Hepburn*, 86.
4. See FRAUD, 8, 9. *Williams v. Threlkeld*, 307.
5. See ATTACHMENT, 14. *Hough v. Smoot*, 318.
6. See INSOLVENT, 25. *Farmers Bank v. Robbins*, 471.

LARCENY.

1. See INDICTMENT, 1. *United States v. McNemara*, 45.
2. A person who steals goods in Maryland and brings them here, is guilty of larceny here. *United States v. Haukey*, 65.
3. In Alexandria, a prisoner indicted under the Act of Congress for larceny has the right of peremptory challenge. *United States v. Negro Peter*, 98.
4. Bank-notes are not goods and chattels, nor money; stealing them, therefore, is no offence at common law. *United States v. Negro Henry Bowen*, 133.
5. An indictment will not lie, at common law, for stealing "a mulatto boy, called William Foote, of the price of \$500, of the property, goods, and chattels of one F. T.," if he is not averred to be a slave. *United States v. Godley*, 153.
6. See BANK-NOTES, 3. *United States v. Betty Read*, 159.
7. Upon an indictment in Alexandria for larceny, the prisoner is entitled to a peremptory challenge. *United States v. Thomas Gee*, 163.
8. Horse-stealing in the District of Columbia, is punishable as an ordinary larceny under the Act of Congress of 1790, for the punishment of certain crimes; although by the Maryland Acts of 1793, c. 57, § 10, and 1799, c. 61, § 1 and 3, the punishment is death, or labor on the roads in Baltimore County. *United States v. Samuel Black*, 195.
9. When the punishment may be death the Court will allow peremptory challenge. *Ibid.*
10. Upon an indictment under the Virginia Act of the 26th of December, 1792, for feloniously breaking the store-house of Cook and Clare, and taking therefrom goods to the value of more than four dollars, the jury may find the prisoner guilty of simple larceny. *United States v. William Read*, 198.
11. See INDICTMENT, 14, 15. *United States v. Golding*, 212.
12. If goods be delivered to a workman for a special purpose, and he afterwards takes them away with intent to steal them, it is larceny. *United States v. Strong*, 251.
13. See HORSE-STEALING, 3. *United States v. Krouse*, 252.
14. If a man steals goods in North Carolina and brings them here, he is guilty of larceny here. *United States v. Mason*, 410.
15. Bank-notes are not goods and chattels nor money, and cannot be the subject of larceny at common law. *United States v. Carnot*, 469.
16. In larceny, "one silver coin of the value of fifty cents" is a sufficient description of the property stolen. *United States v. Rigsby*, 364.
17. See EVIDENCE, 141. *United States v. Negro Richard*, 439.

LEVY COURT.

1. The Levy Court of Washington County, District of Columbia, are only entitled to a moiety of the fixed fines, penalties, and forfeitures accruing under the adopted laws of Maryland; not of the common-law discretionary fines, nor of those imposed under original Acts of Congress. *Levy Court v. Ringgold*, 659.
2. The Levy Court of Washington County is not bound to repair the gaol erected by the United States in that county. *Ibid.*
3. The marshal had no right to expend the funds of the Levy Court of Washington County in the repairs of the gaol, without their order. *Ibid.*
4. The Levy Court is authorized, by the Act of Congress of the 1st of July, 1812, § 12, to ascertain, conclusively, the sum required for rebuilding the bridge over Rock Creek. *The United States, at the relation of the Levy Court, v. Corporation of Washington*, 174.
5. The following are items of general county expenses and charges to be borne and defrayed by the City of Washington and the other parts of the county equally, namely,—for the attendance of the members of the Levy Court; rent of rooms; salary of the clerk; removing records; advertising notices of meetings; summoning a member to attend; expense of assessment; and commission for collecting county taxes. *Levy Court v. Corporation of Washington*, 175.

LIBEL.

1. See ELECTION, 2. *McClean v. Fowle*, 118.
2. See EVIDENCE, 97. *Evans v. Evans*, 240.

LICENSE.

1. The widow and administratrix of a deceased tavern-keeper cannot sell spirituous liquors under her husband's license, nor can she transfer it to another. *United States v. Overton*, 42.
2. An indictment will not lie against an inhabitant of the City of Washington for retailing spirituous liquors without a license. *United States v. Jacob Dixon*, 92.
3. See FERRIES, 1. *Berry's case*, 13.
4. *Id.* 2. *Young's case*, 453.

LIEN.

1. See BANK OF POTOMAC. *Burford v. Crandell*, 86.
2. See BANK, 4. *Neale v. Janney*, 188.
3. A contract to deliver hides then in the vat, to the plaintiff, to indemnify him for his responsibility for a debt due by the defendants which has since been satisfied, will not constitute a lien upon the hides in favor of the plaintiff, to indemnify him for his responsibility for another debt of the defendants for which the plaintiff is liable, where the rights of a third person have intervened. *Talbot v. McPherson*, 281.
4. See EXECUTION, 9. *Maul v. Scott*, 367.
5. See INSOLVENT, 25. *Farmers Bank v. Robbins*, 471.
6. See DUTIES, 1. *United States v. Murdoch et al.* 486.
7. See BANK OF WASHINGTON, 1, 2, 3. *Brent v. Bank of Washington*, 517.
8. See INSOLVENT, 33. *Owen et al. v. Glover*, 578.
9. See FRAUD, 14. *McClean v. Miller*, 620.

LIMITATION.

1. In Virginia, an executor may pay a debt barred by the act of limitations. *Fairfax v. Fairfax*, 25.
2. After interlocutory decree and an issue ordered, the Court will not permit the defendant to plead the statute of limitations, and to file an answer. *Wilson v. Turberville*, 27.
3. The Court will not permit the statute of limitations to be pleaded after the rule day, unless it be shown by affidavit to be necessary for the justice of the case. *Thompson v. Afflick*, 46.
4. The Maryland statute of limitations, of twelve years, is a bar to an action against the devisee of the obligor, brought in Alexandria, upon a bond executed and assigned in Maryland; all the parties having continued to reside in Maryland until the expiration of the twelve years. The payment of part of the debt by the executor within the twelve years does not take the case out of the statute as against the heirs and devisees. *Gilpin v. Plummer*, 54.
5. The Act of Congress of April 30, 1790, limiting the prosecution for misdemeanor

LIMITATION, (*Continued.*)

- to two years, is applicable to common-law misdemeanors in the District of Columbia. *United States v. Porter*, 60.
6. The Court will permit the plea of limitations to be filed after the rule day, upon an affidavit showing it to be a fair defence under the circumstances of the case. *Beatty v. Van Ness*, 67.
 7. The defendant has a right to plead the statute of limitations at the first term after office-judgment; it being an issuable plea. *Morgan v. Evans*, 70.
 8. In an action upon a bond payable by instalments, the jury may and ought to presume payment of any instalments payable more than twenty years before the commencement of the suit; and may presume payment of an instalment payable nineteen years and ten months before suit brought. *Miller v. Evans*, 72.
 9. In Alexandria, D. C., the statute of limitations may be pleaded upon setting aside the office-judgment at the first term. *Gregg v. Bontz*, 115.
 10. See BAIL, 11. *Craig v. Hilton*, 116.
 11. The acknowledgment of the original cause of action accompanied by a refusal to pay unless compelled by law, will not take the case out of the statute of limitations. *Jenkins v. Boyle*, 120.
 12. The act of limitations runs in favor of an insolvent debtor, notwithstanding his discharge under the insolvent act. *Denny v. Henderson*, 121.
 13. In Virginia, a person who has been in possession of a slave for five years, need not show the deed under which he claims title. *Love v. Boyd*, 156.
 14. The act of limitations of Virginia is not a bar to a judgment, if execution has been issued thereon and returned within ten years after the date of the judgment. *Irwin v. Henderson*, 167.
 15. The offer of terms of compromise is not sufficient to take the case out of the statute of limitations. *Neil v. Abbott*, 193.
 16. If the statute of limitations be pleaded after the plea day, without leave of the Court, the plea will, on motion, be ordered to be stricken out. *Scott v. Lewis*, 203.
 17. A promise to pay "when able," will take the case out of the statute of limitations, without proof that the defendant has since been able to pay the debt. *Davis v. Van Zandt*, 208.
 18. The statute of limitations may be pleaded on the first day of the term next after office-judgment. *Mechanics Bank v. Lynn*, 246.
 19. If the defendant instruct his attorney to plead the statute of limitations, and he plead it after the rule day, the Court will refuse to order the plea to be stricken out, if the attorney, having been recently admitted to practice, was ignorant of the rule which requires that such a plea should be filed strictly within the rule day. *Weitzel v. Bussard*, 252.
 20. Distress for taxes due to the Corporation of Washington is not barred by the statute of limitations. *Hogan v. Ingle*, 352.
 21. The Court will permit an executor to plead the statute of limitations at the trial term; to which plea the plaintiff cannot make more than one replication. *Offutt v. Hall*, 363.
 22. The defendant's expressing a willingness to pay a debt barred by the act of limitations if a certain account should be allowed as a set-off, is not such an acknowledgment as will take the case out of the statute. *Nichols v. Warfield*, 429.
 23. Terms offered by way of compromise cannot be given in evidence to rebut the statute of limitations. *Ash v. Hayman*, 452.
 24. The defendant said he thought the plaintiff had charged up the note to his account; if that was not the case he would "attend" to it; this is sufficient to rebut the plea of the statute of limitations. *Bank of Alexandria v. Clarke*, 464.
 25. If the plaintiffs are misnamed in the title of the cause in the margin of the plea of limitations, the plea is bad on special demurrer. *Bank of Columbia v. Jones*, 516.
 26. The English Statute of West. 2-13 E. 1, c. 45, which gives a *scire facias* to revive judgments in personal actions is still in force in Virginia for that purpose. The Act of Virginia of December 19, 1792, § 5, limiting the time of issuing writs of *scire facias* in certain cases, is an act of limitations, and must be pleaded. The defendant cannot avail himself of it by plea of *nul tiel record*; nor by motion to quash the *scire facias*; nor by motion in arrest of judgment. It does not apply to a case where an execution has been issued and returned. *Offutt v. Henderson*, 553.

LIMITATION, (*Continued.*)

27. See EVIDENCE, 169. *Rhodes v. Hadfield*, 566.
28. See BANK OF COLUMBIA, 5, 6. *Bank of Columbia v. Cook*, 574.
29. *Id.* 7. *Bank of Columbia v. Sweeney*, 704.
30. In allowing claims upon a trust fund, as between contending creditors, a claim upon a judgment of more than twelve years' standing, must be rejected without pleading the statute of limitations, as there was no time when the debtor or his administrator could plead it. *Farmers and Mechanics Bank v. Melvin et al.* 614.
31. The statute of limitations must be pleaded strictly within the rule day, unless the Court, for good cause shown, shall permit it to be pleaded afterwards. *Union Bank v. Eliason*, 629.
32. *Non assumpsit infra tres annos* is not a good plea to an action against the maker of a promissory note, payable sixty days after date. It should be *actio non accrevit*. *Union Bank v. Eliason*, 667.
33. Upon a note payable on demand the cause of action does not accrue until demand; and if the debtor remove before demand, the act of limitations is no bar. In the County of Washington, D. C., the act of limitations of Maryland is no bar to an action upon a note made by the defendant in Massachusetts, if the plaintiff has always resided in that State; and to a plea of the statute he may reply that he was beyond seas. *Lee v. Cassin*, 112.

LOTTERY.

1. It was not lawful, in 1812, in the District of Columbia, to sell lottery tickets in the Potomac and Shenandoah Navigation Lottery, although the lottery was authorized by an act of the Legislature of Maryland, passed in 1809; and a note given for the purchase of such tickets in 1812, being given for an unlawful consideration, was void. *Thompson v. Milligan*, 207.
2. See CORPORATION OF WASHINGTON, 7. *Clark v. Corporation of Washington*, 502.
3. The holders of tickets in the Washington Lottery had no right to sue the managers upon the bond given by them to the Corporation of Washington, without the leave of the corporation; nor to sue the contractor for the lottery, on his bond given to the managers, without their consent. *Brent v. Davis*, 632.
4. The plaintiff cannot maintain an action upon a note given for the purchase of a ticket in a lottery prohibited by law. A lottery for the sale of lots or lands is within the prohibition of the Maryland Act of 1792, c. 58. *Hawkins v. Cox and Smith*, 173.

LUTHERAN CHURCH.

Although a dedication of a lot to pious uses may be too vague an appointment to be carried into effect in a court of equity, upon general principles, yet if it has been long occupied for those uses, with the knowledge and consent of the donor, his heirs may be perpetually enjoined from disturbing the possession. *Kurtz v. Beatty et al.* 699.

MANDAMUS.

1. A writ of *mandamus* is the proper process to compel the Corporation of Washington to pay to the county treasurer one half of the expense of erecting a bridge over Rock Creek, according to the 11th section of the Act of Congress of the 1st of July, 1812. *United States v. Corporation of Washington*, 174.
2. See APPEAL, 3. *Deneale's Executrix v. Young*, 200.
3. A writ of error to the judgment of the Circuit Court of the District of Columbia, awarding a peremptory *mandamus*, is a *supersedeas*; and if the peremptory *mandamus* be issued after the filing of the writ of error, and within ten days after the rendition of the judgment, it will be quashed. *United States v. Columbia Ins. Co.* 266.
4. See CORPORATION OF WASHINGTON, 5. *United States v. Carbery*, 358.

MANSLAUGHTER.

1. See CHALLENGE, 3. *United States v. Craig*, 36.
2. A slave convicted of manslaughter in Alexandria, D. C., may be punished by burning in the hand and whipping. *United States v. Negro Tom*, 114; *United States v. Clark*, 620.
3. If the tenant kill the constable who comes to make an unlawful distress for rent, the jury may, according to the circumstances of the case, find their verdict for manslaughter. *United States v. Elizabeth Williams*, 438.

MANUMISSION.

1. See EVIDENCE, 47. *United States v. Negro Jacob Bruce*, 95.

MANUMISSION, (*Continued.*)

2. See FREEDOM, 12. *Negro Jo. Thompson v. Clarke*, 145.
3. *Id.* 13. *Negro Sarah v. Taylor*, 155.
4. *Id.* 29. *Negro Alice v. Morté*, 485.

MARINER.

1. An owner of a slave may hire him as a mariner to the master of a vessel for a foreign voyage, and may authorize the slave to sign the shipping articles, and the owner will be bound thereby; and the wages will be forfeited by any act of the slave which would forfeit his wages if he were a free man; but his wages are not forfeited by his quitting the vessel after the voyage was ended, and before the cargo was discharged. *Slacum v. Smith*, 149.
2. If goods are lost from the ship by the negligence of the mate, he cannot recover his wages; but he is not liable for a mere mistake in returning to the master a bale more than was actually received. *Conner v. Levering*, 163.

MARSHAL.

1. The Court will not, on motion, discharge a prisoner for debt who has the benefit of the prison bounds, because the creditor refuses to pay the daily allowance. *Ex parte William Wilson*, 7.
2. See INSOLVENT, 2. *Knox et al. v. Summers et al.* 12.
3. The marshal may justify appearance bail at the second term, after exceptions taken at the rules. *Quarre. Brent v. Brashears*, 59.
4. See AMERCEMENT, 2. *Williams v. Craven*, 60.
5. See BAIL, 19. *Heyer et al. v. Wilson*, 369.
6. See ASSIGNMENT, 7. *Ibid.*
7. A defendant committed in execution upon a *ca. sa.* is liable to the marshal for his poundage, which may be recovered in an action of *assumpsit*. *Ringgold v. Glover*, 427.
8. See FREEDOM, 30. *Rebecca v. Pumphrey*, 514.
9. See AMERCEMENT, 3. *Winter v. Simonton*, 585.
10. The marshal is bound to take sufficient appearance bail in all cases, except, &c., and he is the judge of its sufficiency. *Poe v. Mounger*, Vol. I. 145; *Bennett v. Pendleton*, Vol. I. 146.

MASTER OF VESSEL.

By the Virginia law of January 25, 1798, § 6 and 7, a master of a vessel is liable to the owner of a slave for his loss if he takes the slave out of the county of Alexandria, D. C., without the written authority of his owner, or a compliance with the other requisites of the act. A general hiring to the defendant for eleven months, without any limitation as to the nature and place of his employment, is not such a permission as the act requires, although the plaintiff knew that the defendant's occupation was that of a master of a vessel, and the slave was a seaman. The person to whom the slave is hired is not the owner within the meaning of the statute. *Park v. Willis*, 83.

MECHANICS BANK OF ALEXANDRIA.

Under the charter of the Mechanics Bank of Alexandria, it is not necessary that the eight directors, who are to be practical mechanics, should be in actual practice at the time of the election. *Gray et al. v. Mechanics Bank*, 51.

MILITIA.

1. A warrant officer of the navy is exempt from militia duty. *Sanford v. Boyd*, 78.
2. See IMPRESSMENT. *Jacobs v. Levering*, 117.
3. In an action of trespass against the marshal of the District of Columbia, for levying a distress for a militia fine, it is only necessary for him, in his justification, to prove those facts which give jurisdiction to the military court, and that it was regularly constituted and imposed the fine. The acts of such a court are presumed to be correct, and it is not competent for the plaintiff to show their irregularity. *Slade v. Minor*, 139.
4. An alien is not liable to militia duty. *Ibid.*
5. The clerks employed in the offices of the several departments of the Government are not liable to militia duty. *Ex parte W. S. Smith*, 693.

MISDEMEANOR.

In cases of misdemeanor, the Court in Alexandria will not compel the traverser to plead to the indictment until a prosecutor's name be indorsed; and the recognizance will be respited, unless the attorney of the United States shall

MISDEMEANOR, (*Continued.*)

satisfy the Court that it is a case which ought to be excepted out of the general rule. *United States v. Carr*, 439.

MISNOMER.

1. The mistake of the clerk in misnaming one of the parties in the commission to take the deposition of a witness, may be amended by the order to issue the commission in case of the death of the witness before the trial. *Boone v. Janney*, 312.
2. *Quare*, whether the misnomer of a corporation aggregate must be pleaded in abatement. *Central Bank v. Tayloe*, 427.
3. See LIMITATION, 25. *Bank of Columbia v. Jones*, 516.
4. The title of the cause written on the margin of a plea is no part of the plea, but is only an intimation to the clerk in what cause he is to enter the plea; and a mistake of the name of one of the parties in the cause, made in the marginal title, is not fatal to the plea, even upon special demurrer. *Bank of Columbia v. Ott's Administrator*, 529.

MISTAKE.

A mistake of the law is not a ground of relief in equity where no fraud is charged. *Robinson v. Cathcart*, 590.

MORTGAGE.

1. In a suit between contending mortgagees, the mortgagor is a competent witness for the first mortgagee to identify the goods described in the first mortgage. *Wagner v. Watts*, 169.
2. A mortgage of "the whole of my stock of books and stationery now remaining in my possession, and also such additions thereto as I may hereafter make from time to time to the same," is not void for uncertainty, but conveys only the stock on hand at the date of the mortgage. *Ibid.*

NATURALIZATION.

Naturalization cannot be proved by parol. *Slade v. Minor*, 139.

NE EXEAT.

1. In an action for maliciously holding the plaintiff to bail upon a *ne exeat* for a larger sum than was due, the Court will grant a new trial if the verdict for the plaintiff is against the weight of the evidence. *Zantzinger v. Weightman et al.* 478.
2. In granting a new trial, the Court will make it a condition that the verdict shall stand until another shall be rendered. *Ibid.*
3. In an action for maliciously holding the plaintiff to bail upon a *ne exeat*, the plaintiff may give evidence that he has suffered in the public estimation in consequence of the process of *ne exeat*, but not in consequence of reports circulated by the defendant, although such reports may be given in evidence by the plaintiff to show malice in the defendants; nor can he give evidence of special damage not averred in the declaration. The plaintiff in such an action must show both malice and the want of probable cause, and that the defendants knew that they had not probable cause. The bill and affidavit, and the order of the judge granting the *ne exeat*, are *prima facie* evidence of probable cause. *Ibid.*
4. A *ne exeat* bond only binds the sureties to the extent of the final decree of the Court; and if the plaintiff continually remain in the district, according to the condition of the bond, they will be discharged altogether. *Ibid.*
5. The declaration, in such an action, must aver the want of probable cause; and for want of such an averment the judgment will be arrested. *Ibid.*

NEGLECTANCE.

1. Upon a count, charging negligence of the defendant and his servants, it is sufficient to prove negligence of the servant. *Dobbin v. Foyles*, 65.
2. A count for injuring the mare safe, may be joined, and advantage can only be taken of the misjoinder, if it be one, by special demurrer. *Ibid.*
3. The surety in an official bond conditioned that the principal shall "faithfully" execute the duties of his office, is not liable for honest error in judgment or want of skill of the principal; but gross negligence is want of fidelity. *Commissioners of the County of Alexandria v. Corse*, 363.

NEW TRIAL.

1. If the jury take out the coroner's inquest and depositions, and find the defendant guilty of murder, a new trial will be granted. *United States v. Michael Clarke*, 152.
2. In cases of tort, courts have seldom granted new trials on the ground of excessive damages, unless they were so excessive as to imply gross partiality or corruption on the part of the jury. *Swann v. Bowie*, 221.
3. If, at the trial, all objections to a deposition are waived, and a new trial be granted, the Court will not suffer objections to be made to the same deposition upon the new trial. *Edmondson v. Barrell*, 228.
4. A motion in arrest of judgment and for a new trial may be made at the same time, but the motion in arrest will be first heard. *Turner v. Foxall*, 324.
5. A motion for a new trial, or in arrest of judgment, is a waiver of the benefit of a stay of execution agreed upon by the parties. *Brent v. Coyle*, 348.

NIL DEBIT.

Nil debet is not a good plea in the District of Columbia, to a judgment of a State Court in Kentucky; but the defendant may, with the leave of the Court, and upon terms, withdraw it and plead *nul tid record*. *Short v. Wilkinson*, 22.

OFFICIAL BOND.

1. In an official bond, the words, "well and faithfully execute the office, and in all things relating to the same, well and faithfully behave," mean the same as the words, "faithfully perform the trust reposed in them." *Bank of the United States v. Brent*, 696.
2. Such a bond, given by a teller of a bank, is not void because executed fourteen days after he had entered on the duties of his office. *Ibid*.

OFFICE JUDGMENT.

1. If the defendant die after office judgment, and writ of inquiry awarded, his administrator cannot plead *plene administravit*, nor any other plea which the original defendant himself could not have pleaded. *Janney v. Mandeville's Administrator*, 31.
2. See LIMITATION, 9. *Gregg v. Bontz*, 115.
3. *Id.* 18. *Mechanics Bank v. Lynn*, 246.

ORPHANS' COURT.

1. An issue sent by the Orphans' Court to this Court to try the validity of a will cannot be removed to the other county under the Act of Congress of the 24th of June, 1812, § 8. *Carter v. Cutting*, 58.
2. New evidence cannot be heard upon an appeal from the Orphans' Court. *Gittings v. Burch*, 97.
3. See ADMINISTRATION, 16. *Nichols v. Hodge*, 582.
4. *Id.* 17. *Ibid*.
5. *Id.* 18. *Ibid*.
6. An executrix has a right to appeal from a sentence of the Orphan's Court to this Court without giving security to prosecute the appeal with effect; and this Court will grant a *mandamus* accordingly. *Dowale v. Young*, 200.
7. When an issue is sent from the Orphans' Court to be tried in this Court, and is accompanied by the libel and answer, they may be read in evidence upon the trial of the issue. *Evans v. Evans*, 240.

PARDON.

The offender who has committed an infamous offence is restored to his competency as a witness by a pardon. *United States v. Rutherford*, 528.

PARISH.

1. The vestry and wardens of "the Protestant Episcopal Church of Alexandria" were the vestry of the Protestant Episcopal Church in the parish of Fairfax in the ecclesiastical meaning of those words, as modified by the laws and constitution of Virginia and the canons of the church. *Mason v. Mason et al.*, 274.
2. By the sale made under the decree in the case of *Taylor et al. v. Ferrott et al.* the purchasers become privies to the church, and may avail themselves of the estoppel resulting from the warranty of Daniel Jennings the original grantor. *Id.*

PARTNERSHIP.

1. A copartnership is not chargeable for goods sold to one of the partners for his separate use, although he ordered them to be charged to the firm, if the vendor knew at the time, that they were for the sole use of that partner. *Gullat et al. v. Tucker*, 33.
2. The defendant cannot set off a separate debt of one partner against a partnership claim. *Lynn v. Hall*, 52.
3. See EVIDENCE, 73. *Nicholson v. Patton*, 164.
4. See DEPOSITION, 6. *Garrett v. Woodward*, 190.
5. In order to charge Robert upon a bill drawn by James in his own name, it is necessary to prove that James and Robert carried on business in partnership under the firm of James. *Prima facie* it is the sole bill of James. *Nicholson v. Patton*, 164.
6. See EVIDENCE, 133, 134. *Hutchinson v. Peyton*, 365.
7. One partner cannot maintain an action at law against the other partner upon a partnership transaction, unless for a balance struck and a promise to pay. *Goldsborough v. McWilliams*, 401.
8. See CONSIDERATION, 12. *Rice v. Barry*, 447.
9. See FRAUD, 10. *Ibid.*
10. See BILLS AND NOTES, 85, 86, 87, 88. *Greatrake v. Brown*, 541.
11. See ATTACHMENT, 25, 26, 27. *Averill v. Tucker et al.* 544.
12. If the garnishee in an attachment under the Maryland Act of 1795, c. 56, is only one of the members of a mercantile company indebted to the defendants, he cannot be chargeable alone as garnishee. *Ellicott v. Smith*, 543.
13. Part-owners of a ship are not joint partners. Each may maintain a separate action against the ship's husband, for his proportion of the freight, and it is no objection that the ship's husband is one of the part-owners. *Magruder v. Bowie and Kurtz*, 577.
14. Upon the dissolution of a mercantile firm, if it be agreed that the acting partner shall take all the effects and pay all the debts of the firm, and this be known to the creditor of the firm, he cannot, with a good conscience, take a lien on the joint effects for new advances made by him to the acting partner on his own individual account so as to exhaust the joint effects, and leave the retiring partner liable for the old joint debt. *McClean v. Miller*, 620.
15. A written contract by one of two joint partners made in his own name, does not bind the other partner, although the money obtained is brought into the joint concern. *Smith v. Hoffman*, 651.

PART-OWNER.

See PARTNERSHIP, 13. *Magruder v. Bowie and Kurtz*, 577.

PATENT-RIGHT.

If a person who has made an improvement upon a machine already patented by another, take out a patent for the whole improved machine, the patent is void; and if knowingly sold as a valid patent the vendor cannot recover upon a note given for the purchase-money. *Turner v. Johnson*, 287.

PAYMASTER.

1. See EVIDENCE, 123, 124. *United States v. Van Zandt*, 338.
2. If a regimental paymaster neglects or fails to make any report to the paymaster-general once in two months, showing the disposition of the funds previously transmitted, with estimates for the next payment of the regiment, and neglects or fails, for more than six months after receiving the funds, to account for the same, and is not recalled for such neglect, but additional funds are placed in his hands notwithstanding his known neglects and defaults, the sureties in his official bond are not chargeable for his failure to account for such additional funds. *Ibid.*

PAYMENT.

1. If the creditor accept a deed of land in payment of the debt, it is a bar to the action for the debt; and if the title be defective, the creditor must look to his warranty. *Miller v. Young*, 53.
2. See DEPOSITION, 2. *Ibid.*
3. See BANK, 3. *Bank of Alexandria v. Saunders*, 183.
4. Payments made to the original creditor after notice of the assignment of the debt, cannot be given in evidence in a suit brought by the assignee in the name of the original creditor. *Gardner et al. v. Tennison*, 338.

PAYMENT, (*Continued.*)

5. An executor indebted to his testator's estate, cannot, in an action upon his administration-bond, brought by creditors or legatees, discharge himself by showing payment to his co-executors. *United States v. Rose*, 567.

PIOUS USES.

See LUTHERAN CHURCH. *Kurtz v. Beatty*, 699.

PLEADING.

1. When the issue is joined upon a matter of law, the Court will not, at the request of either party, instruct the jury upon the matter of law submitted to the jury by the pleadings. *Common Council of Alexandria v. Brockett*, 13.
2. The Court may, in its discretion, allow the general issue to be pleaded after judgment upon demurrer has been awarded by the Supreme Court of the United States, and a mandate to this Court to enter the judgment and award a writ of inquiry. *Sheehy v. Mandeville*, 15.
3. See JUDGMENT, 2. *Short v. Wilkinson*, 22.
4. See OFFICE-JUDGMENT, 1. *Janney v. Mandeville*, 31.
5. When a contract has been executed, *indebitatus assumpsit* will lie for the amount due upon it. *Maupin v. Pic*, 48.
6. See LIMITATION, 3. *Thompson v. Afflick*, 46.
7. Case will lie for use and occupation of land in Virginia, but all the joint tenants or tenants in common, interested with the plaintiffs, must be joined as plaintiffs in the action; and, if they are not, the defendant may take advantage of the omission, without pleading it in abatement. *Newton et al. v. Reardon*, 49.
8. See LIMITATION, 4. *Gilpin v. Plummer*, 54.
9. See AGREEMENT, 1. *Brockett v. Hammond*, 56.
10. See NEGLIGENCE, 1, 2. *Dobbin v. Foyles*, 65.
11. The statute of gaming may be given in evidence upon *non assumpsit* without notice. *Watson v. Bayley*, 67.
12. See LIMITATION, 7. *Morgan v. Evans*, 70.
13. A person for whose benefit an action is brought, but who does not appear to be a party upon the record, nor to be interested in the cause, cannot come in and, in his own name, reply fraud and collusion between the legal plaintiff and the defendant, to defeat the action, and such a replication is bad upon demurrer. *Welch v. Mandeville et al.* 82.
14. See ALIENAGE, 2. *Otteridge v. Thompson*, 108.
15. See JUDGMENT, 4. *Stone v. Stone*, 119.
16. In trespass, when the defence is on warrant, the plaintiff is not permitted to give evidence of trespass committed on a place not located on the plats, nor outside of the plaintiff's lines as located by him on the plats; although by his title he had a right to locate them so as to include the place where, &c. The plaintiff is bound by his location, and cannot claim land not included therein. The plaintiff cannot recover unless he was in possession of the land at the time of the alleged trespass. *Holmead v. Corcoran*, 119.
17. A special plea of *non est factum* must conclude with a verification. *Contee v. Garner*, 162.
18. See LIMITATION, 14. *Irwin v. Henderson et al.* 167.
19. See DEMURRER, 3. *Ibid.*
20. An action of *assumpsit*, in the nature of an action of deceit, will lie for knowingly and falsely representing a slave sold by the defendant to the plaintiff, to be sound, although there should be a bill of sale under seal warranting the slave to be a slave for life, without expressly warranting the soundness of the slave. *Grant v. Bontz*, 184.
21. See LIMITATION, 16. *Scott v. Lewis*, 203.
22. See JOINT DEFENDANTS, 3. *Edmondson v. Barrell*, 228.
23. The defendant cannot take advantage of a variance between the writ and the declaration by demurrer, without praying *oyer* of the writ. *Triplett v. Warfield*, 237.
24. See JUDGMENT, 10, 11. *Union Bank v. Crittenden*, 238.
25. See LIMITATION, 18. *Mechanics Bank v. Lynn*, 246.
26. The Court, at the imparlance term, will permit the defendant to plead any issuable plea to the merits, although the rule to plead shall have expired. *Darvall v. Talbot*, 249.

PLEADING, (*Continued.*)

27. If the defendant instruct his attorney to plead the statute of limitations, and he plead it after the rule day, the Court will refuse to order the plea to be stricken out, if the attorney, having been recently admitted to practice, was ignorant of the rule which requires that such a plea should be pleaded strictly within the rule day. *Wetzel v. Bussard*, 252.
28. See BILLS AND NOTES, 46. *Lapeyre et al. v. Gales*, 291.
29. See EVIDENCE, 116. *Dorsey v. Chenault*, 316.
30. If the jury find for the plaintiff in replevin, upon the plea of *non demisit modo et formā*, the judgment must be for the plaintiff upon the whole case, although they find for the defendant upon the issue of *no rent arrear*. *Ibid*.
31. Upon a demurrer to evidence, the Court cannot render judgment for the plaintiff if the declaration be substantially defective. *Bank of the United States v. Joseph Smith*, 319.
32. In an action against the indorser of a note which, in the body of it, is made payable at a particular bank, the declaration must contain an averment of demand of payment at that bank. *Ibid*.
33. In an action of slander if the declaration contain some good and some bad counts, the Court will refuse a general instruction to the jury, that the plaintiff cannot recover without proof of the facts stated in the good counts; the question whether the other counts are, or are not good, being properly a question arising upon a motion in arrest of judgment. *Turner v. Foxall*, 324.
34. Where an administrator is defendant, the Court, sitting in Alexandria, will permit him to plead the statute of limitations at the trial term; to which plea the plaintiff cannot make more than one replication. *Offut v. Hall*, 363.
35. In cases of misdemeanor the Court, in Alexandria, will not compel the traverser to plead to the indictment until a prosecutor's name be indorsed; and the recognizance will be respited, unless the attorney of the United States shall satisfy the Court that it is a case which ought to be excepted out of the general rule. *United States v. Carr*, 439.
36. See BOOKS AND PAPERS, 2. *Central Bank v. Tuiyloe*, 427.
37. See CONSIDERATION, 12. *Rice v. Barry*, 447.
38. A count, upon a promise by one partner to pay, in consideration that the plaintiff who arrested the other partner upon a *ca. sa.* would, at the present defendant's request, forbear to prosecute that other partner upon the *ca. sa.*, and would not trouble him; but let him go out of the custody of the marshal; and in further consideration that the debt was a partnership debt, for which the present defendant was equally liable with the other partner, and which he had promised that other partner to pay, is not double or multifarious, and is good even upon special demurrer. *Ibid*.
39. If the plaintiffs are misnamed in the title of the cause in the margin of a plea of limitations, the plea is bad on special demurrer. But see *Bank of Columbia v. Ott*, post, 529; *Bank of Columbia v. Jones*, 516.
40. See ATTACHMENT, 19. *Baker v. Mix*, 525.
41. The title of the cause written in the margin of a plea is no part of the plea, but is only an intimation to the clerk in what cause he is to enter the plea; and a mistake in the name of one of the parties, made in the marginal title, is not fatal to the plea, even upon special demurrer. *Bank of Columbia v. Ott*, 529.
42. In trover by husband and wife for a conversion of the wife's goods before marriage, the declaration must conclude *ad damna ipsorum*. *Semmes and Wife v. Sherburne*, 534.
43. See ATTACHMENT, 20, 21, 22. *Jones v. Kemper*, 535.
44. See EXECUTION, 15. *Offutt v. Henderson*, 553.
45. See GAMING, 5. *Wheford v. Gilham*, 556.
46. In an action against the indorser of a promissory note payable sixty days after date, *non assumpsit infra tres annos* is a bad plea upon general demurrer; it ought to be *actio non accrevit*. *Bank of Columbia v. Ott*, 575; *Union Bank v. Eliason*, 667.
47. See LIMITATIONS, 31. *Union Bank v. Eliason*, 629.
48. In an action for maliciously arresting and holding the plaintiff to bail without probable cause, the declaration must contain an averment that the suit in which the plaintiff was so arrested and holden to bail was determined, or it will be bad on general demurrer. *Barrell v. Simonton*, 657.

PLEADING, (*Continued.*)

49. See *INSOLVENT*, 33, 34. *Keirl v. McIntire*, 670.
50. See *BANK OF COLUMBIA*, 7. *Bank of Columbia v. Sweeny*, 704.
51. A variance between the *captias ad respondendum* and the declaration is not a ground for arresting the judgment. *Wilson v. Berry*, 707.

POST-OFFICE.

1. In an indictment under the 18th section of the Act of the 30th of April, 1810, "regulating the post-office establishment," against a person employed in a department of the general post-office, charging him with embezzling letters with which he was intrusted and stealing therefrom sundry bank-notes, it is not necessary to aver that the letters were intended to be conveyed by post, nor to describe particularly the letters, or the bank-notes, it being averred that the particular description of the letters and of the bank-notes was unknown to the grand jurors. *United States v. Golding*, 212.
2. It is not a valid objection to the indictment, that the embezzlement of the letters and stealing therefrom the bank-notes, are charged in the same count of the indictment. *Ibid.*

PRACTICE.

1. Upon a petition for freedom, the defendant may appear and disclaim without entering into the usual recognizance. *Negro Walter Thomas v. Scott*, 2.
2. When the issue is joined on a matter of law, the Court will not, at the prayer of either party, instruct the jury upon the matter of law, submitted to the jury by the pleadings. *Common Council of Alexandria v. Brockett*, 13.
3. The plaintiff's counsel may fill up the blank indorsement at the trial, although the defendant indorsed the note for the accommodation of the maker. *Bank of the United States v. Roberts*, 15.
4. See *PLEADING*, 2. *Sheehy v. Mandeville*, 15.
5. See *JUDGMENT*, 2. *Short v. Wilkinson*, 22.
6. See *EVIDENCE*, 15. *Davis v. Forrest*, 23.
7. In replevin, if the title to the goods be in issue, the Court will grant a new trial if the jury give the defendant a verdict for the value of the goods as well as for damages for taking them. *Thompson v. Carbery*, 39.
8. Under the Maryland Act of 1798, c. 101, ch 8, § 15, the Court, and not the jury, is to ascertain whether the defendant paid away all the assets before notice of the plaintiff's claim. *Hellen v. Beatty*, 29.
9. See *ATTACHMENT*, 2. *Mott v. Smith*, 33.
10. See *BASTARDY*, 1. *United States v. Clements*, 30; *United States v. Dick*, 409.
11. If the defendant die after office-judgment, and writ of inquiry awarded, his administrator cannot plead *plene administravit*, nor any other plea which the original defendant himself could not have pleaded. *Janney v. Mandeville*, 31.
12. See *LIMITATION*, 3. *Thompson v. Afflick*, 46.
13. Costs are not given, in the Supreme Court, upon reversal. *Conway v. Alexander*, 57.
14. An issue sent by the Orphans' Court to this Court to try the validity of a will, cannot be removed to the other county, under the Act of June 24, 1812, § 8. *Carter v. Cutting*, 58.
15. The marshal may justify appearance bail at the second term after exception taken at the rules. *Brent v. Brashears*, 59.
16. See *AMERCEMENT*, 2. *Williams v. Craven*, 60.
17. Two or more counts for misdemeanor may be joined in one indictment. *United States v. Porter*, 60.
18. Upon an indictment for barratry, no evidence can be given of specific acts without notice. *Ibid.*
19. Notice given after the commencement of the trial is too late. *Ibid.*
20. See *EVIDENCE*, 31, 32, 33. *Ibid.*
21. The plaintiff having removed his family into the county of Washington, the rule to give security for costs was rescinded. *Nicholls v. Johns*, 66.
22. The declarations of the assignor, made after the assignment of a chose in action will not be received to defeat the action brought in his name. *Palmer v. Cassin*, 66.
23. See *LIMITATION*, 6. *Beatty v. Van Ness*, 67.
24. Witnesses may be removed while others are examined. *Patton v. Janney*, 71.

PRACTICE, (*Continued*.)

25. One joint defendant in an action of assumpsit cannot confess judgment so as to enable him to testify in behalf of the other defendants. *Ibid*.
26. See INSURANCE, 2, 3. *Ibid*.
27. See DEPOSITION, 3. *House v. Cash*, 73.
28. See BILLS AND NOTES, 14. *Riddle v. Mott*, 73.
29. See BAIL, 8. *Burns v. Sim's Bail*, 75.
30. See EVIDENCE, 41. *Underwood v. Huddleston*, 76.
31. *Id.* 44. *Custiss v. Georgetown and Alexandria Turnpike Co.* 81.
32. See PLEADING, 13. *Welch v. Mandeville*, 82.
33. See BILLS AND NOTES, 15. *Underwood v. Huddleston*, 93.
34. The Court will not reinstate a replevin which has been discontinued at a previous term. *Nicholls v. Hazel*, 95.
35. An account for work and labor cannot, at the trial, be given in evidence upon *non assumpsit* as a set-off, unless the account has been filed, and notice given. *Whetcroft v. Burford*, 96.
36. In Alexandria, an execution *de bonis propriis* is the proper process against an executor upon a decree in equity for the balance of his administration account. *Catlett v. Fairfax*, 99.
37. The Court will not, upon motion, quash the return of a *fi. fa.* levied upon an equity of redemption. *Warfield v. Wirt*, 102.
38. Trespass *vi et armis* will lie for the master against one who beats his slave, although there should be no loss of service. *Garey v. Johnson*, 107.
39. See BAIL, 10. *Bussard v. Warner's Bail*, 111.
40. If the defendant be acquitted upon a flaw in the indictment, he will be remanded for trial at the next term. *United States v. Bennett Smith*, 111.
41. See EQUITY, 5. *Grundy v. Young*, 114.
42. See LIMITATION, 9. *Gregg v. Bontz*, 115.
43. See ELECTION, 1. *Scholfield v. Union Bank*, 115.
44. See BAIL, 10. *Jenkins v. Porter*, 116.
45. *Id.* 11. *Craik v. Hilton*, 116.
46. See JUDGMENT, 4. *Stone v. Stone*, 119.
47. See EVIDENCE, 60, 61. *Holmead v. Corcoran*, 119.
48. See LIMITATION, 11. *Jenkins v. Boyle*, 120.
49. See BAIL, 12. *Sharpless v. Knowles*, 129.
50. See JUDGMENT, 5. *Simpson v. Legg*, 132.
51. See ADMINISTRATION, 5. *Adams v. Whiting*, 132.
52. See GAMING, 3. *United States v. Rounsavel*, 133.
53. See AMENDMENT, 3. *Comegys v. Robb*, 141.
54. See CIRCULATING MEDIUM. *United States v. Ray*, 141.
55. See NEW TRIAL, 1. *United States v. Michael Clarke*, 152.
56. A prisoner in execution for debt, at the suit of the United States, is entitled to the benefit of the prison bounds, upon giving sufficient security. *United States v. Anderson*, 157.
57. See INSOLVENT, 11. *Mattingly v. Smith*, 158.
58. *Id.* 12. *Keene v. Jackson*, 166.
59. See LIMITATION, 14. *Irwin v. Henderson et al.* 167.
60. See ASSIGNMENT, 5. *Weightman v. Queen*, 172.
61. See BANK OF COLUMBIA, 1. *Okely v. Boyd*, 176.
62. See BANK-NOTES, 4. *Armat v. Union Bank of Georgetown*, 180.
63. See BILLS AND NOTES, 29. *Auld v. Peyton*, 182.
64. *Id.* 27. *Munroe v. Mandeville*, 187.
65. If the verdict be below the jurisdiction of the Court, the jury is not entitled to the fee of twelve shillings. *Skinner v. McCaffrey*, 193.
66. In covenant for rent, interest does not accrue until demand. *Wise v. Ressler*, 199.
67. The attachment first served on the garnishee binds the effects in his hands, although the marshal has other and prior writs of attachment in his hands at the time of such service. *McCobb v. Tyler*, 199.
68. The attachment first served is entitled to priority of payment. *Johnson v. Griffith*, 199.
69. See APPEAL, 3. *Deneale's Executor v. Young*, 200.
70. See LIMITATION, 16. *Scott v. Lewis*, 203.
71. See DAMAGES, 1. *Taylor v. Turner*, 203.

PRACTICE, (*Continued.*)

72. See AFFIDAVIT, 7. *Union Bank of Georgetown v. Riggs*, 204.
73. See DISCONTINUANCE, 2. *Shurburne v. King*, 205.
74. See ATTACHMENT, 13. *Sears v. Noon*, 220.
75. See NEW TRIAL, 2. *Swann v. Bowie*, 221.
76. See BY-LAW, 8. *Common Council v. Manderville*, 224.
77. See JOINT DEFENDANTS, 2. *Smith v. Woodward et al.* 226.
78. After issue joined in replevin it is too late to move to quash the writ. *Smble.* that the Act of Maryland which requires two sureties in replevin-bonds, is directory only; and that the writ is not void if there be only one surety. *Halber v. Beall*, 227.
79. See EJECTMENT. *McCormick's Lessee v. Magruder*, 227.
80. See JOINT DEFENDANTS, 3. *Edmondson v. Barrell*, 228.
81. *Ibid.* *Nicholls v. Fearson*, 526.
82. See EVIDENCE, 90. *Travers v. Appler*, 234.
83. See BAIL, 14. *King v. Simm's Bail*, 234.
84. See COSTS, 4. *Roberts v. Reintzel*, 235.
85. See JUDGMENT, 10, 11. *Union Bank v. Crittenden*, 238.
86. *Id.* 12. *Bank of Washington v. Piltz*, 241.
87. See ARBITRATION, 2. *Thornton v. Chapman*, 244.
88. See LIMITATION, 18. *Mechanics Bank v. Lynn*, 246.
89. *Quere*, whether an indictment will lie at common law, for enticing away a slave. *United States v. Negro Pompey*, 246.
90. See JURY, 10. *Darius Claggett's case*, 247.
91. See EVIDENCE, 101. *United States v. Miller*, 247.
92. See AMENDMENT, 4. *Tayloe v. Wharfield*, 248.
93. See PLEADING, 26. *Darnall v. Talbot*, 249.
94. See BILLS AND NOTES, 42, 43. *Bank of Washington v. Way*, 249.
95. See BAIL, 15, 16. *Day v. Hackley*, 251.
96. See LIMITATION, 19. *Wetzel v. Bussard*, 252.
97. See DEMURRER, 8. *Triplet v. Warfield*, 237.
98. See BILLS AND NOTES, 45. *Brown v. Piatt*, 253.
99. See JURISDICTION, 9. *Ritchie v. Stone*, 258.
100. See DEPOSITION, 16. *Van Ness v. Heineke*, 259.
101. See CONTINUANCE, 1. *Bestor v. Sardo*, 260.
102. See CONSIDERATION, 9. *Munro v. Robertson*, 262.
103. See BAIL, 17. *Ringgold v. Renner*, 263.
104. The Court will, on affidavit, reinstate a cause *non-prossed* on a rule for security for costs laid on the plaintiff who had no attorney in Court; his attorney having died, and no rule served on the plaintiff to employ new counsel. *Cook v. Beall*, 264.
105. See DISCONTINUANCE, 3. *McCleod v. Gloyd*, 264.
106. See BILLS AND NOTES, 46. *Bowie et al. v. Blacklock*, 265.
107. See ELECTION, 3. *United States v. Columb. Ins. Co. of Alexandria*, 266.
108. See MANDAMUS, 3. *Ibid.*
109. See DISCONTINUANCE, 4. *Brent v. Coyle*, 287.
110. See BILLS AND NOTES, 47. *Ibid.*
111. *Id.* 48. *Bank of Washington v. Reynolds*, 289.
112. *Id.* 49. *Lapoyre et al. v. Gibbs*, 291.
113. *Id.* 51. *Riggs v. Graeff*, 298.
114. The security which a judge, signing a citation on a writ of error which is to be a *supersedeas*, shall take, is to be for the costs and such damages as the Supreme Court may award for the delay. *Renner v. Bank of Columbia*, 310.
115. See AMENDMENT, 5. *Boone v. Janney*, 312.
116. See BILLS AND NOTES, 58. *Neale v. Peyton*, 313.
117. *Id.* 59, 60. *Irvin v. Brown*, 314.
118. After the jury has retired to consider of their verdict, the Court will not instruct them upon any matter at the motion of either of the parties. If the jury asks instruction upon any matter of law, the Court will give it. A motion in arrest of judgment and for a new trial may be made at the same time; but the motion in arrest will be first heard. *Turner v. Foxall*, 324.
119. See BAIL, 18. *Wormsley v. Beedle*, 331.
120. If the plaintiff deliver his *fi. fa.* to the marshal, and die, and the marshal levy it

PRACTICE, (*Continued.*)

- on the goods of the defendant, he has a right under the law of Virginia, to give a forthcoming bond, payable to the deceased creditor; and such bond will support a judgment upon motion by the administrator of the creditor. *Entwisle v. Bussard*, 331.
121. See **BILLS AND NOTES**, 63. *Smith et al. v. Glover*, 334.
122. See **BY-LAW**, 10. *White v. Corporation of Washington*, 337.
123. See **COSTS**, 8. *Wright v. Waters*, 342.
124. The plaintiff cannot be nonsuited for not producing books and papers upon a mere notice by the defendant to produce them at the trial. There must be a motion to the Court for an order to produce them; and notice of such a motion, and an order of the Court; and if the motion be not made until the cause is called for trial at the last calling of the docket, the Court will continue the cause until the next term. *Bank of the United States v. Kurtz*, 342.
125. See **FREEDOM**, 23, 24. *Negro Matilda v. Mason*, 343.
126. A motion for a new trial, or in arrest of judgment, is waiver of the benefit of a stay of execution agreed upon by the parties. *Brent v. Coyle*, 348.
127. See **COSTS**, 9. *Emerson v. Beale*, 349.
128. See **JUSTICE OF THE PEACE**, 33. *Goulding v. Fenwick*, 350.
129. See **BILLS AND NOTES**, 69. *Ott v. Jones*, 351.
130. See **LIMITATION**, 21. *Offut v. Hall*, 363.
131. If the marshal upon a *capias ad respondendum*, be amerced debt and costs nisi, the defendant may, at or before the next term, give bail and exonerate the marshal. *Heyer et al. v. Wilson*, 369.
132. If the bill of exchange, which was the original cause of action, be lost, it is sufficient, in order to amerce the marshal in the whole amount of debt and costs, (for not bringing in the defendant arrested upon a *capias ad respondendum*,) to tender to the marshal an assignment of the right of action upon the bill; and that assignment may be made by the attorney and agent of the plaintiff. *Ibid.*
133. See **BILLS AND NOTES**, 71. *Cuna v. Friend*, 370.
134. See **JUDGMENT**, 19. *Ault v. Elliott*, 372.
135. This Court has authority to suspend an attorney from practice for a limited time, or to expel him entirely; and may, for that purpose, inquire in a summary manner as to any charges of malpractice alleged against him. *Ex parte Levi S. Burr*, 379.
136. See **JUDGMENT**, 20. *Holmes v. Bussard*, 401; *McSherry v. Queen*, 406; *Blagrove v. Ringgold*, 407.
137. See **JUSTICE OF THE PEACE**, 36. *Minor's case*, 404.
138. In all criminal prosecutions the attorney of the United States, upon the general issue, has a right to close the argument before the jury. *United States v. Bates*, 405.
139. See **COSTS**, 12. *Blagrove v. Ringgold*, 407.
140. See **DISCONTINUANCE**, 5. *Williamson v. Bryan*, 407; *French v. Venable*, 509.
141. See **INSOLVENT**, 18. *Frere v. Mudd*, 407.
142. A cause in equity, in this Court, may be reheard, if the petition for rehearing be filed before the end of the next term after the final decree and if no appeal lies to the Supreme Court in that cause. *Clarke v. Threlkeld*, 408.
143. See **JURISDICTION**, 16. *United States v. Negro Ellick*, 412.
144. See **MISDEMEANOR**. *United States v. Carr*, 439.
145. See **DEPOSITION**, 21. *Renner v. Howland*, 441.
146. See **EVIDENCE**, 143. *Stuart v. Columb. Ins. Co.* 442.
147. See **INSOLVENT**, 19, 20. *Connelly's case*, 415.
148. If payment of a note be demanded and refused on the third day of grace, notice to the indorser on the next day is in due time. *Read v. Curbery*, 417.
149. See **ADMINISTRATION**, 12. *Owen v. Blanchard*, 418.
150. Unless notice of set-off be given before the suit is called for trial, it will not be permitted to be given in evidence upon *non assumpsit*. *Deneale v. Young*, 418.
151. See **DEPOSITION**, 22. *Bussard v. Catalino*, 421.
152. See **JUSTICE OF THE PEACE**, 41. *Adams v. Kincaid*, 422.
153. See **ATTACHMENT**, 16. *Bolton v. White*, 426.
154. See **MARSHAL**, 7. *Ringgold v. Glover*, 427.
155. The Court will not quash a *fi. fa.* issued after the death of the defendant, if it bear *t-teste* before his death. *Kane v. Love*, 429.

PRACTICE. (*Continued.*)

156. See ADMINISTRATION, 14. *Caldor v. Pyper*, 430.
157. Where there are contending assignees of a cause of action pending in Court, the Court will not, on motion, decide the merits of their respective claims, by ordering the action to be entered upon the docket as for the use of either of them. *Thomas v. Elliot*, 432.
158. See BAIL, 21. *Ibid.*
159. See ATTACHMENT, 17. *Kurtz v. Jones*, 433.
160. If the plaintiff examines his attorney as a witness, he waives his privilege, and upon cross-examination, the attorney is bound to answer generally. *Crittenden v. Strother*, 464.
161. After the jury is sworn to try the issue upon the allegations against the debtor, the Court will not permit the allegations to be amended by inserting the name of another creditor. *Walter Newton's case*, 467.
162. The Court has a discretion upon a motion to change the venue, and will not, in general, change it, unless the suggestion be accompanied by an affidavit, stating the grounds of belief that an impartial trial cannot be had in the county in which the suit is instituted. *Lewis v. Fire Insurance Co.* 500.
163. The United States are entitled to judgment upon revenue bonds at the return term, although, by the general rule and practice of the Court, the day after the last day of the term is the appearance day to all writs returnable to that term; and the Court will, upon motion, rule the marshal to return the writ on some day during the term. *United States v. May and Snyder*, 507.
164. See DISCONTINUANCE, 5. *French v. Venable*, 509.
165. If the plaintiff has countermanded his execution at the request of the defendant to give him time, or if he has been delayed by injunction obtained by the defendant, he may take out a new execution after the expiration of the year and day. *Muncaster v. Mason*, 521.
166. See EXECUTION, 12. *Owen et al. v. Glover*, 522.
167. See ATTACHMENT, 19. *Baker v. Mix*, 525.
168. *Id.* 20. *Jones v. Kemper*, 535.
169. See DISCONTINUANCE, 6. *Nicholls v. Fearson*, 526.
170. See BARON and FEME, 2. *Summs and Wife v. Sherburne*, 534.
171. See ATTACHMENT, 20, 21, 22. *Jones v. Kemper*, 535.
172. If some of the terre-tenants named in the *scire facias* are returned "*nihil*" an *alias scire facias* must be issued against them, or the cause will be discontinued. *Semble*, that the *scire facias* or its return must describe the land held by each tenant. *Baker v. French et al.* 539.
173. See EXECUTION, 15. *Offutt v. Henderson*, 553.
174. If, after the jury is sworn and impanelled it appears to be a case in which it is necessary to examine and determine upon accounts between the parties, the Court will order the jury to be discharged, and the accounts to be audited and stated by the auditor of the Court agreeably to the Maryland Act of 1785, c. 80, § 12, and that he report to the Court. *United States v. Rose*, 567.
175. See BARON and FEME, 3. *Robinson v. Gutheart*, 590.
176. A warrant of commitment must be under the seal of the committing magistrate, and must show a charge upon oath. *Ex parte Bennett*, 612.
177. LIMITATION, 30. *Farmers and Mechanics Bank v. Melvin*, 614.
178. A decree *nisi*, upon default of appearance and answer to a bill in chancery, does not become absolute until the end of "the term next succeeding that to which the decree shall be returned executed." *Stewart v. Smith*, 615.
179. See LIMITATION, 31. *Union Bank v. Eliason*, 629.
180. See JOINT DEFENDANTS, 4. *Hypocrite v. Hyatt & Wilson*, 633.
181. No paper can be read in evidence to the jury without the leave of the Court. *Melvin v. Lackland*, 636.
182. See DISCONTINUANCE, 9. *Riggs v. Chester*, 637.
183. See LIMITATION, 32. *Union Bank v. Jones*, 667.
184. See ARBITRATION, 6, 7, 8, 9. *Masterson v. Kahner*, 669.
185. See INSOLVENT, 33, 34. *Kee v. McArthur*, 670.
186. See APPEAL, 10. *Cumbe v. Nairn*, 676.
187. *Id.* 11. *Cass v. Bennett*, 677.
188. See EXECUTION, 17. *Johnson v. Glover*, 678.
189. See ATTACHMENT, 35. *Humans v. Coombe*, 681.

PRACTICE. (*Continued*.)

190. See JOINT DEFENDANTS, 5. *Newton v. Weaver*, 685.

191. See BANK, 7. S. *Union Bank v. Mackall*, 695.

192. A variance between the *capias ad respondendum* and the declaration is not a ground for arresting the judgment. *Wilson v. Berry*, 707.

PRETENSED TITLES.

See LAND, 1. *Miller v. Young*, 53.

PRISON BOUNDS.

1. The Court will not, on motion, discharge a prisoner for debt who has the benefit of the bounds, because the creditor refuses to pay the daily allowance. *Ex parte Wm. Wilson*, 7.

2. A prisoner in execution for debt at the suit of the United States is entitled to the benefit of the prison-bounds, upon giving sufficient security. *United States v. Anderson*, 157.

3. See INSOLVENT, 31. *Owen et al. v. Glover*, 578.

4. See EVIDENCE, 155. *Smoot v. Lee*, 459.

5. If a debtor be taken on a *ca. sa.* in the District of Columbia, and give a prison-bounds bond, upon which also judgment has been rendered against him, he may be retaken upon the original *ca. sa.* after the expiration of a year from the date of the bond, and committed to close custody in execution. *Owen et al. v. Glover*, 522.

PUBLIC OFFICER.

1. *Quare*, whether the salary of a public officer of the United States is liable to attachment? *Averill v. Tucker*, 544.

2. *Quare*, whether the treasurer of the United States can be compelled to appear as garnishee and is liable for money in his hands as treasurer? *Ibid.*

3. An agent for the payment of the salaries of the clerks in an executive department of the Government of the United States, is bound to appear as garnishee when summoned. *Ibid.*

4. See JURISDICTION, 24. *Vasse v. Comegyss*, 564.

5. A public officer who receives money in advance for the contingencies of his office, is a receiver of public money within the meaning of the Act of Congress of March 3, 1797. *United States v. R. B. Lee*, 462.

RAPE.

1. An attempt, by a slave, to ravish a white woman, is punishable by death. *United States v. Negro Patrick*, 66.

2. After the jury is sworn in a capital case, and the cause has been opened, the Court cannot, without the prisoner's consent, discharge a juror at his own request. *United States v. Negro Randall*, 412.

RENT.

1. Judgment by motion, on notice, cannot be obtained upon a bond given to secure rent, upon an attachment on the suggestion that the tenant is about to remove. *Simpson v. Legg*, 132.

2. A distress for rent, laid on the last day of the term, at noon, is too soon. *Johnson v. Owens*, 160.

3. The owner of a race-field who knowingly lets it for the purpose of public races, and for booths and stands for the accommodation of licentious and disorderly persons, for the purposes of unlawful gaming, and of gross immorality and debauchery, to the corruption of morals and manners, cannot recover the rent in an action of covenant. *Holmead v. Maddox*, 161.

4. See ATTACHMENT, 5. *Keene v. Jackson*, 166.

5. In covenant for rent, interest does not accrue until demand. *Wise v. Ressler*, 199.

6. See EVIDENCE, 116. *Dorsy v. Chenault*, 316.

7. Costs do not accrue, upon levying a distress for rent, unless the goods are sold. *Wright v. Waters*, 342.

8. Chairs left with a painter to be repaired are not liable for his rent. *Mauro v. Boteler*, 372.

9. See DISCONTINUANCE, 5. *Williamson v. Bryan*, 407.

10. See CONSTABLE, 3. *United States v. Elizabeth Williams*, 438.

11. See JUDGMENT, 22. *Ringgold v. Elliot*, 462.

12. See DISCONTINUANCE, 5. *French v. Venable*, 509.

RENT, (*Continued.*)

13. In order to support an action on a replevin bond it is not necessary that the defendant in replevin, who has recovered judgment against the plaintiff in replevin for damages and costs, should obtain a writ of *retorno habendo*, returned "*eloigned*;" but the nonpayment of the damages found by the jury is a breach of the condition of the bond upon which an action may be maintained. *Moore v. Shields*, 529.
14. A bailiff cannot lawfully force himself into a house by the outer door (although partially opened by one within) to make a distress for rent. *United States v. Slott*, 552.
15. If the landlord draws an order on his tenant on account of rent, and the tenant accepts but does not pay it when due, and suffers himself to be sued for it by the payee, he is not entitled to set it off under the plea of "no rent arrear" in an action of replevin, if the landlord, at the trial of the replevin, produces the order cancelled, and offers to surrender it to the tenant and to pay the costs of the suit brought upon it. *Arguelles v. Wood*, 579.
16. If the jury find the amount of rent arrear in damages, without stating it to be the amount of the rent, the Court will permit the verdict to be so amended by the clerk after the jury have rendered their verdict and retired from the bar, and even after another cause has been tried. And upon such a verdict the Court will award a *retorno habendo*, and will not arrest the judgment because the jury have not found the value of the distress taken. *Ibid.*
17. See BAIL, 9. *Wager v. Lear*, 92.

REPLEVIN.

1. Upon the issue of "no rent arrear," the plaintiff in replevin will not be permitted to show that the defendant "had nothing in the tenements." *White v. Cross*, 17.
2. An assignment by the lessor during the term, does not, without attornment, prevent the lessor from distraining. *Ibid.*
3. In replevin for goods distrained for rent, the defendant cannot give evidence of the value of the use and occupation. *Ibid.*
4. In replevin, if the title of the goods be in issue, the Court will grant a new trial if the jury give the defendant a verdict for the value of the goods as well as damages for taking them. *Thompson v. Carbery*, 39.
5. If A replevies from B, who had replevied from A, the Court will quash the second replevin, and upon a motion made for the return of the property in the first replevin, will order it to remain with the person who appears to have the right of possession according to the Maryland law of 1785, c. 80, § 14. *Birch v. Gittings*, 66.
6. In debt on a replevin bond, the Court refused to require special bail. *Jenkins v. Porter*, 116.
7. See RENT, 2. *Johnson v. Owens*, 160.
8. The Court will not, at a subsequent term, reinstate an action of replevin which had been *non-prossed* upon a rule to declare. *McDavid v. Fisk*, 160.
9. In an action upon a replevin bond it seems that the defendant may, in mitigation of damages, give evidence of fraud by which the defendant was cheated by the plaintiff and others in playing at cards, whereby the plaintiff won the mare of the defendant, which was the subject of the replevin. *Ibid.*
10. *Quære*, whether a replevin bond is sufficient with only one surety: whether the law of Maryland respecting replevins for property distrained for taxes is applicable to replevins for property distrained for corporation taxes: whether property distrained for city taxes by a city collector, is in the custody of the law, and thereby protected against replevins? *Orr v. Ingle*, 193.
11. See DISCONTINUANCE, 2. *Shuborn v. King*, 205.
12. After issue joined it is too late to move to quash the writ. *Scmble*, that the Act of Maryland, which requires two sureties in replevin bonds is directory only; and that the writ is not void if there be only one surety. *Haller v. Beall*, 227.
13. See EVIDENCE, 96. *Wise v. Bowen*, 239.
14. See DISCONTINUANCE, 3. *McLeod v. Gough*, 264.
15. It is not necessary to the validity of a replevin bond, that the plaintiff should be bound in the bond. *Wood v. Forrest*, 303.
16. See EVIDENCE, 116. *Dorsey v. Charvat*, 316.
17. See DISCONTINUANCE, 1. *Nichols v. Hetzel*, 95.

REPLEVIN. (*Continued.*)

18. A judgment for the defendant in replevin without a declaration, is irregular, and will, on motion, be set aside, even at a subsequent term. *Ringgold v. Elliott*, 462.
19. If the defendant in replevin be the bailiff of the landlord, and be indemnified by him, he may be examined as a witness in the cause. *Quere? Dixon v. Waters*, 527.

SET-OFF.

1. The defendant cannot set off a separate debt of one partner against a partnership claim. *Lynn v. Hall*, 52.
2. An account for work and labor cannot, at the trial, be given in evidence upon *non assumpsit* as a set-off, unless the account has been filed and notice given. *Whitcroft v. Burford*, 96.
3. See ASSIGNMENT, 5. *Wrightman v. Queen*, 172.
4. A debt due by the plaintiff to one of two joint defendants cannot be set off against the joint debt due to the plaintiff. *Waters v. Bussard*, 226.
5. See ASSIGNMENT, 6. *Gardner et al. v. Tennison*, 338.
6. Unless notice of set-off be given before the suit is called for trial, it will not be permitted to be given in evidence upon *non assumpsit*. *Deneale v. Young*, 418.
7. A claim which has been pleaded or offered in evidence as a set-off, and rejected by the verdict of the jury, will not maintain an action. *Janney v. Smith*, 499.
8. See BANK OF WASHINGTON, 1. *Brod v. Bank of Washington*, 517.
9. See RENT, 15, 16. *Arguelles v. Wood*, 579.

SLANDER.

1. In slander, the defendant may, in mitigation of damages, give evidence of the grounds of his belief of the truth of the charge which he has made. *Cooke v. O'Brien*, 17.
2. Words, charging the plaintiff, a single woman, with incontinency, are not actionable without an allegation of special damages. *Keiler v. Lessford*, 190.
3. See PLEADING, 33. *Turner v. Foxall*, 324.
4. Words, spoken in relation to the credit of a holder of shares in the joint stock of a boat, are actionable if special damage thereby be alleged in the declaration; but the averment of such special damage is not sufficient to support the action without the averment of a *colloquium* respecting the plaintiff as a shareholder in the boat, and that it was a business requiring credit. *Ibid.*
5. In mitigation of damages the defendant may give evidence of the general reputation of the plaintiff's want of punctuality in payment of his debts. *Ibid.*
6. If one of the counts be bad, and the verdict be general, the judgment must be arrested. *Ibid.*
7. Handwriting cannot be proved by comparing the paper in dispute with other papers acknowledged to be genuine. *Ibid.*
8. If a witness upon his cross-examination has sworn falsely, in the opinion of the jury, upon an immaterial point, it is competent for them to give their verdict upon his testimony in chief upon other points, corroborated by other testimony. *Ibid.*
9. See PRACTICE, 118. *Ibid.*

SLAVE.

1. See FREEDOM, 1. *Negro Walter Thomas v. Scott*, 2.
2. See EVIDENCE, 2. *Queen v. Neale*, 3.
3. *Id.* 3. *Queen v. Hepburn*, 3.
4. See FREEDOM, 4. *Bell v. Hegau*, 21.
5. *Id.* 5. *Ibid.*
6. See EVIDENCE, 15. *Davis v. Forrest*, 23.
7. Trespass *vi et armis* will lie for assaulting and shooting the plaintiff's slave, without a *per quod servitium amissit*. *Norman v. Davis*, 16.
8. See EVIDENCE, 26. *United States v. Thomas*, 36.
9. An attempt by a slave to ravish a white woman is punishable by death. *United States v. Negro Patrick*, 66.
10. In an action upon the case for maliciously conspiring to deprive the plaintiffs of their slave, it is necessary for them to prove malice in the defendant; and it is competent for the defendant to show probable cause, and the want of malice. *Lewis et al. v. Spalding*, 68.

SLAVE, (*Continued.*)

11. A slave is not a competent witness against a free black person in a capital case; but free blacks, unless they are in a state of servitude by law, are competent witnesses against free blacks. *United States v. Minta Butler*, 75.
12. By the Virginia law of the 25th of January, 1798, §§ 6 and 7, a master of a vessel is liable to the owner of a slave for his loss if he takes the slave out of the County of Alexandria in the District of Columbia without a written authority from his owner, or the compliance with the other requisites of that act; and a general hiring to the defendant for eleven months, without any limitation as to the nature or place of his employment, is not such a permission as the act requires, although the plaintiff knew that the defendant's occupation was that of a master of a vessel, and the slave was a seaman. *Park v. Wills*, 83.
13. See EVIDENCE, 47. *United States v. Bruce*, 95.
14. See FREEDOM, 9. *Negro Robert Simmons v. Gird*, 100.
15. *Id.* 10. *Negro Emanuel v. Ball*, 101.
16. *Id.* 11. *Negro Violette v. Ball*, 102.
17. Trespass *vi et armis* will lie for the master against one who beats his slave, although there should be no loss of service. *Garey v. Johnson*, 107.
18. An indictment will not lie against a person for dealing with a slave without his master's consent, the statute having provided a different mode of prosecution. *United States v. Pickering*, 117.
19. See FREEDOM, 12. *Negro Jo. Thompson v. Clarke*, 145.
20. See MARINER, 1. *Slacum v. Smith*, 149.
21. An action upon the case will lie for the loss of the plaintiff's slave although the defendant acquired and kept possession of the slave wrongfully and unlawfully. *Washington v. Wilson*, 153.
22. An indictment will not lie at common law for stealing a mulatto boy, if he is not averred to be a slave. *United States v. Godley*, 153.
23. See INSOLVENT, 10. *Watson v. Hall*, 154.
24. See FREEDOM, 13. *Negro Sarah v. Taylor*, 155.
25. See LIMITATION, 13. *Love v. Boyd*, 156.
26. A deed of manumission, when acknowledged and recorded, relates to the time of its execution. *Betty v. Deneale*, 156.
27. See FREEDOM, 15. *Negro Sam Bias v. Rose*, 159.
28. *Id.* 16. *Contee v. Garner*, 162.
29. *Id.* 17. *Negro Sam v. Green*, 165.
30. An action of *assumpsit* in the nature of an action of deceit, will lie for knowingly and falsely representing a slave, sold by the defendant to the plaintiff to be sound, although there should be a bill of sale, under seal, warranting the slave to be a slave for life without expressly warranting the soundness of the slave. *Grant v. Bontz*, 184.
31. See FREEDOM, 18. *Negro Sam Reeler v. Robinson*, 220.
32. Length of time does not raise a presumption against the slave, that his owner took the oath required by law. *Negro Jack Garretson v. Lingan*, 236.
33. *Quare*, whether an indictment will lie at common law for enticing away a slave. *United States v. Negro Pompey*, 246.
34. See FREEDOM, 19. *Negro Dunbar v. Ball*, 261.
35. *Id.* 20. *Negro Daniel v. Kincheloe*, 295.
36. *Id.* 21. *Negro Joseph Brown v. Wingard*, 300.
37. See HIRE. *Scott v. Bartleman*, 313.
38. See EVIDENCE, 20. *Negro Humphries v. Tench*, 337.
39. See FREEDOM, 23. *Negro Matilda v. Mason*, 343.
40. *Id.* 26. *Negro William Jordan v. Sawyer*, 373.
41. *Id.* 27. *Negro Vincent v. Simpson*, 405.
42. See JURISDICTION, 16. *United States v. Negro Ellick*, 412.
43. Cruelly, inhumanly, and maliciously to cut, slash, beat, and ill treat his own slave is an indictable offence at common law. *United States v. Robert Brockett*, 441.
44. See FREEDOM, 28. *Negro Amelia v. Caldwell*, 418.
45. *Id.* 33. *Negro Fanny v. Tiffet*, 463.
46. *Id.* 29. *Negro Alice v. Morté*, 485.
47. *Id.* 30. *Negro Rebecca v. Pumphrey*, 514.
48. *Id.* 31. *Negro Peter v. Preuss*, 561.

SLAVE, (*Continued*.)

49. See FREEDOM, 32. *Negro Letty v. Lowe*, 634.

50. If the plaintiff's slave be hired to the defendant in the District of Columbia, who carries her to New Hampshire without the authority or consent of the plaintiff, by means whereof she is lost to the plaintiff, he may, in trover, recover the value of the slave. But if the plaintiff assented to the defendant's taking the slave to New England, either before or after he took her, and she was lost without any negligence or omission of the defendant, the plaintiff is not entitled to recover. *Simmes v. Sherburne*, 637.

51. See JURISDICTION, 31. *United States v. Negro Calvin et al.* 640.

52. *Quere*, whether a free colored man is a competent witness in a cause between white persons. *O'Neale v. Willis*, 108.

53. A slave convicted of manslaughter in Alexandria, District of Columbia, may be punished by burning in the hand and whipping. *United States v. Negro Tom*, 114.

54. There can be no binding contract between a slave and his master. *Negro Fanny v. Kell*, 412.

55. The child of a female slave is a slave, although the mother has the promise of the master that she shall be free at the end of a certain term of years. *Ibid*.

SPECIFIC EXECUTION.

1. See CONTRACT, 2. *Dunlop v. Hepburn et al.* 86.

2. *Id.* 13. *Robinson v. Cuthcart*, 590.

SPIRITUOUS LIQUORS.

An indictment will not lie against an inhabitant of the City of Washington for retailing spirituous liquors within the city. *United States v. Dixon*, 92.

STATE LAWS.

See EVIDENCE, 127. *Commercial and Farmers Bank v. Patterson*, 346.

SUPERSEDEAS.

1. A *supersedeas* judgment is absolutely void unless acknowledged by the original defendant and two sureties. *Smith v. Middleton*, 233.

2. S. P. *Mandeville v. Love*, 249.

3. A writ of error to the judgment of the Circuit Court of the District of Columbia, awarding a peremptory *mandamus* is a *supersedeas*, and if the peremptory *mandamus* be issued after the filing of the writ of error, and within ten days after the rendition of the judgment, it will be quashed. *United States v. Columbian Ins. Co. of Alexandria*, 266.

4. See PRACTICE, 114. *Renner v. Bank of Columbia*, 310.

5. A *supersedeas* judgment must recite the original judgment correctly. *Holmes v. Bussard*, 401.

6. S. P. *McSherry v. Queen*, 406.

7. After *supersedeas*, an appeal cannot be taken from the original judgment. *Coulombe v. Naurn*, 676.

SURETY.

1. See REPLEVIN, 12. *Holler v. Beall*, 227.

2. See SUPERSEDEAS, 1. *Smith v. Middleton*, 233.

3. *Id.* 2. *Mandeville v. Love*, 249.

4. See PAYMASTER, 1, 2. *United States v. Van Zandt*, 338.

5. See ADMINISTRATION, 11. *Young v. Mandeville*, 444.

6. *Id.* 4. *Birch v. Spaulding*, 422.

7. If a creditor, having the bond of his debtor with a surety, takes a new security payable at a day beyond the time of payment of the bond, without the consent of the surety, with the understanding that he was not to trouble the principal for the money unless the new security should prove to be good for nothing, the surety is discharged, and his remedy is in equity. *Smith v. Crease*, 481.

TALLIES.

See EVIDENCE, 90. *Tracers v. Apple*, 234.

TAVERN.

The widow and administratrix of a deceased tavern-keeper cannot sell spirituous liquors under her husband's license, nor can she transfer it to another. *United States v. Overton*, 42.

TAXES.

1. See BY-LAW, 5. *Morgan v. Rowan*, 148.
2. See REPLEVIN, 10. *Orr v. Ingle*, 193.
3. A receipt at the bottom of a collector's certificate of a tax sale, to which certificate there is a subscribing witness, may be given in evidence without proving the certificate of sale by the subscribing witness. The receipts of the collector are not evidence upon proof of his handwriting, if he be within the jurisdiction of the Court, and be not a party in the cause. *Mulligan v. Moyne*, 210.
4. See COLLECTOR, 1. *Corporation of Washington v. Walker*, 293.
5. Distress for corporation taxes is not barred by the statute of limitations. *Hogan v. Ingle*, 352.
6. Goods distrained by a collector of city taxes cannot be replevied without a special order from a justice of the peace, as required by the Maryland Act of 1790, c. 53. *Dyer v. Coyle*, 684.
7. The lots lying west of West Street in Alexandria are liable to be taxed like other lots in the town. *Common Council v. Wise*, 27.

TERRE-TENANTS.

If some of the terre-tenants, named in the *scire facias*, are returned "*nilil*," an *alias scire facias* must be issued against them, or the cause will be discontinued. *Scoble*, that the *scire facias*, or its return, must describe the land held by each tenant. *Baker v. French*, 539.

TREASON.

1. The declaration, by the prisoner, of his intention as to any of the overt acts of treason charged in the indictment, may be given in evidence before evidence is offered of such overt acts.
2. The declaration of the prisoner accompanying the overt act laid in the indictment may be given in evidence to show his intention in doing the act; but his confession of having committed the overt act charged cannot be given in evidence. *United States v. Richard H. Lee*, 104.

TRESPASS.

1. Possession in fact, or in law, is necessary to maintain trespass *quare clausam fregit*. *Taylor v. Varden*, 37.
2. See SLAVE, 17. *Garey v. Johnson*, 107.
3. See PLEADING, 16. *Holmead v. Corcoran*, 119.
4. See MILITIA, 3. *Slade v. Minor*, 139.
5. See CONSTABLE, 2. *Wells v. Hubbard*, 292.
6. In trespass *vi et armis* for taking away the plaintiff's son *per quod serritium amisit*, the plaintiff must either prove actual force, or knowledge on the part of the defendant that the young man was under age. *Negro Sampson Soubrey v. Loring*, 318.
7. See JURISDICTION, 25. *Mickum v. Paul*, 568.
8. In trespass *quare clausam fregit* the plaintiff must prove a trespass in the county in which the suit is brought. *Gorman v. Marsteller*, 311.
9. If the close lie partly in Virginia and partly in the District of Columbia, the injury done in the Virginia part may be given in evidence under the *alia enormia*. An entry into the District part of the close, with intent to do injury in the other part, is unlawful, although, without such intent, it would have been lawful. *Ibid.*

USAGE.

1. See BILLS AND NOTES, 30. *Munroe v. Mandeville*, 187.
2. *Id.* 84. *Bank of Alexandria v. Denale*, 488.
3. *Id.* 85. *Bank of Columbia v. Lawrence*, 510.
4. *Id.* 97. *Patriotic Bank v. Farmers Bank*, 560.
5. *Id.* 99. *Coyle v. Gozzler*, 625.

USURY.

1. See EVIDENCE, 33. *United States v. Morley*, 64.
2. *Id.* 45. *Knowles v. Parrott*, 93.
3. *Id.* 51. *Pierce v. Reintzel*, 101.
4. See BILLS AND NOTES, 33. *Gaither v. Lee*, 205.
5. *Id.* 52. *Bank of the United States v. Crabbe*, 299.
6. *Id.* 52. *Union Bank v. Gozzler*, 349.
7. If a promissory note, indorsed by the defendants without an understanding that

USURY, (*Continued*.)

they were not to be responsible upon their indorsement, be discounted by the plaintiff at a rate exceeding the lawful rate of interest for the time the note had to run, the transaction is usurious. *Nicholls v. Fearson*, 703.

VARIANCE.

1. The defendant cannot take advantage of a variance between the writ and the declaration, by demurrer, without praying *oyer* of the writ. *Triplet v. Warfield*, 237.
2. If a note varies substantially from that described in the declaration, it cannot be given in evidence upon a writ of inquiry. *Farmers Bank v. Lloyd*, 411.
3. A note payable in sixty days "with interest from date," will not support a declaration upon a note payable in sixty days without interest. *Coyle v. Gozzler*, 625.
4. A variance between the *capias ad respondendum* and the declaration, is not a ground for arresting the judgment. *Wilson v. Berry*, 707.

VENDOR.

1. See FRAUD, 1. *Gilman v. Herbert*, 58.
2. *Id.* 4. *Conway v. Sherron*, 80.
3. See CONTRACT, 2. *Dunlop v. Hepburn et al.* 86.
4. See ADMINISTRATION, 8. *Greenway v. Roberts*, 246.
5. If a deed of land be set aside in equity, (after the death of the purchaser and his widow,) on account of his fraud, and the purchase-money be decreed to be repaid by the heirs of the vendor to the administrator of the purchaser to be by him distributed as assets, the widow's second husband is entitled, as distributee, to his deceased wife's third of the purchase-money thus repaid. *United States v. Baker*, 615.

VENUE.

1. An issue sent by the Orphans' Court to this Court to try the validity of a will, cannot be removed to the other county under the Act of Congress of the 24th of June, 1812, § 8. *Carter v. Cutting*, 58.
2. The Court has a discretion, upon a motion to change the venue; and will not, in general, change it, unless the suggestion be accompanied by an affidavit stating the grounds of belief that an impartial trial cannot be had in the county in which the suit is instituted. *Lewis v. Fire Insurance Co.* 500.

VERDICT.

1. See AMENDMENT, 7. *Arguelles v. Wood*, 579.
2. See JUDGMENT, 18. *Bank of the Metropolis v. Walker*, 361.

WARRANT.

1. The word "seal" in a scroll is a seal to a justice's warrant, *quære?* *United States v. Hedges*, 43.
2. It is an indictable offence to combine to oppose the execution of a warrant issued by a justice of the peace, without knowing the nature of it, and to assault one of the parties attempting to execute it. *United States v. O'Neale et al.* 183.
3. See CONSTABLE, 2. *Wells v. Hubbard*, 292.
4. The warrant of a justice of the peace, for the violation of a by-law, must set forth the offence substantially within the purview of the by-law. *White v. Corporation of Washington*, 337.
5. A warrant for the violation of a by-law should specify the by-law, and the manner of violating it. So should the judgment. *Boothe v. Corporation of Georgetown*, 356.
6. A signature in black-lead pencil, of a warrant, by a justice of the peace, is not a sufficient signature in law. *United States v. Greenberry Thompson*, 409.
7. If a warrant contain on its face a cause of arrest within the jurisdiction of the magistrate, and purport to have been issued within his local jurisdiction and be, in other respects, formal, the officer is bound to execute it, and resistance is unlawful, although, in fact, the offence was not committed within the local jurisdiction of the magistrate. *Ibid.*
8. See BY-LAW, 13, 14. *Delany v. Corporation of Washington*, 459.
9. *Id.* 16. *McGunnigle v. Corporation of Washington*, 460.
10. See JUSTICE OF THE PEACE, 27. *O'Neil v. Hogan*, 524.
11. A warrant of commitment must be under the seal of the committing magistrate, and must show a charge upon oath. *Ex parte Bennett*, 612.

WITNESS.

1. Witnesses cannot be sent to the grand jury on the part of the accused; nor can a grand juror, after he is sworn, be withdrawn for a cause which existed before he was sworn. *United States v. Palmer*, 11.
2. Witnesses may be removed while others are examined. One joint defendant, in an action of *assumpsit*, cannot confess judgment so as to enable him to testify in behalf of the other defendants. If several actions, against several underwriters, upon the same policy, are submitted to the same jury at the same time, and the jury find verdicts against some of them, but wish to consider further as to the others, those underwriters against whom verdicts were found cannot be examined as witnesses for the others. *Patton v. Janney*, 71.
3. See EVIDENCE, 1, 2, 3, 4, 8, 22, 23, 25, 27, 31, 32, 33, 34, 40, 43, 45, 46, 51, 52, 54, 56, 57, 73, 75, 77, 80, 85, 96, 98, 101, 111, 114, 115, 136, 139, 147, 157, 158, 163, 166, 176, 185, 186, in vol. i.
4. See ADMINISTRATION, 4. *Thompson v. Afflick*, 67.

WRIT OF INQUIRY.

1. In executing a writ of inquiry in Alexandria, the plaintiff's own affidavit may be read in evidence of the amount of damages. *Keene v. Cooper*, 215.
2. See VARIANCE, 2. *Farmers Bank v. Lloyd*, 411.

END OF VOLUME TWO.

